Supreme Court, U.S.
FILED

No. 08-435 SEP 30 2008

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In The

Supreme Court of the United States

KEITH A. HALL,

Petitioner,

v.

LINDA WELLS BACK,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the raising of the defense of qualified immunity in an unlawful termination for political affiliation case based on the First and Fourteenth Amendments of the U.S. Constitution and 42 U.S.C. §1983 require the plaintiff to provide specific, non-conclusory allegations to survive a motion to dismiss in such an intent-based constitutional tort; and, whether the Court should now reject the emasculation of qualified immunity that has resulted from the decision in *Crawford-El v. Britton*, 523 U.S. 574 (1998)?

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The opinion of the United States Court of Appeals for the Sixth Circuit in this case dated August 11, 2008 on appeal from the United States District Court for the Eastern District of Kentucky was recommended for full-text publication, and is reprinted in the appendix to this petition beginning at 1a.

JURISDICTION

On August 11, 2008, the United States Court of Appeals for the Sixth Circuit affirmed the decision of the United States District Court for the Eastern District of Kentucky, denying Petitioner's motion to dismiss based on qualified immunity. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

This case involves the First Amendment to the Constitution of the United States, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

This case also involves the Fourteenth Amendment to the Constitution of the United States, which provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The federal statute involved in this case is 42 U.S.C. §1983, reprinted in full in the appendix beginning at 18a which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The state statutes involved in this case include the civil service statute Ky. Rev. Stat. Ann. §18A.115, which is reproduced in full in the appendix beginning at 19a. Also, K.R.S. §18A.140(1), which is reproduced in full in the appendix beginning at 23a, provides:

> No person shall be appointed or promoted to, or demoted or dismissed from, any position in the classified service, or in any way favored or discriminated against with respect to employment in the classified services because of his political or religious opinions or affiliations or ethnic origin or sex or disability. No person over the age of forty (40) shall be discriminated against because of age.

STATEMENT OF THE CASE

I. Procedural Background

In the underlying case, Ms. Back filed a complaint against Keith A. Hall, individually and in his official capacity as former Director of the Kentucky Office of Homeland Security ("KOHS"); Joel Schrader, individually and in his official capacity as Deputy Director of KOHS; and Major Alecia Webb-Edgington in her official capacity as Director of KOHS. In her complaint, Ms. Back alleged (1) a violation of 42 U.S.C. §1983, claiming that she was dismissed in retaliation for exercising her First Amendment rights (the free-speech claim), and that she was dismissed because of her political affiliation (the political affiliation claim); and (2) a violation of K.R.S. 18A.140. As to

Mr. Hall, the complaint merely alleges that he was a Republican appointee and that he handed Ms. Back, a Democrat, a letter of dismissal signed by someone else.

In an Opinion and Order dated September 29, 2006, Judge Karen K. Caldwell dismissed all of Ms. Back's official-capacity claims on grounds that they were barred by the Eleventh Amendment and dismissed Ms. Back's state-law claims for failure to exhaust administrative remedies. So this left Ms. Back's individual-capacity, §1983 claim against Mr. Hall and Mr. Schrader as her only remaining claim. Ms. Back's §1983 claim contains two separate First Amendment claims: a free-speech retaliation claim and a political affiliation claim.

After Judge Caldwell dismissed her official-capacity claims and state-law claims, Ms. Back moved Judge Caldwell to disqualify herself, which Judge Caldwell granted, but not without reservations. The case was reassigned to Judge Joseph M. Hood.

After reassignment, both Mr. Hall and Mr. Schrader filed motions to reconsider. Mr. Hall asked Judge Hood to reconsider that part of Judge Caldwell's order denying Mr. Hall qualified immunity. In ruling on the motions to reconsider, Judge Hood dismissed Ms. Back's free-speech retaliation claim on grounds that her alleged protected speech was made pursuant to her official job duties. Therefore, Judge Hood ruled that *Garcetti v. Ceballos*, 547 U.S. 410

(2006) barred the free-speech retaliation claim. But, Judge Hood left in place Ms. Back's §1983 claim for unlawful patronage dismissal for political affiliation. Mr. Hall then timely appealed Judge Hood's order denying him qualified immunity to the Sixth Circuit.

II. Factual Background

(INTRODUCTORY NOTE: The following facts are all taken from the Complaint, reprinted in full, beginning on 7a).

Ms. Back was a grants and contracts administrator for KOHS during the transition from the Democratic, under Governor Patton, to the Republican, under Governor Fletcher, administration. Col. Ray A. Nelson, a Governor Patton appointee, served as Executive Director of KOHS during the transition. Governor Fletcher replaced Col. Nelson with Erwin Roberts as Executive Director in March of 2004.

In August of 2004, Mr. Roberts promoted Ms. Back to the position of Internal Policy Analyst III. On September 1, 2004, Ms. Back resigned her position as grants and contracts administrator and accepted her promotion. In October of 2004, Mr. Roberts resigned as Executive Director of KOHS. Mr. Hall was appointed Executive Director of KOHS in November of 2004. The majority of allegations in the complaint concern confrontations between Ms. Back and Deputy Director Joel Schrader that occurred *before* Mr. Hall was appointed Executive Director.

For example, the Complaint alleges in pertinent part:

> From the time of Mr. Schrader's hiring until the termination of Ms. Back, Mr. Schrader repeatedly invoked partisan political considerations in the process of awarding Homeland Security grants, and in the hiring of personnel to administer the Homeland Security program.
>
> Executive Director Roberts . . . assigned Ms. Back the task of setting up the competitive grant application process, including a committee to review grant applications for federal Homeland Security Grants to local governments. Ms. Back recommended a slate of highly qualified persons to serve on the review committee without regard to political affiliation. Nevertheless, Mr. Schrader demanded the removal of persons and organizations from their review committee based on their political affiliation. **Ms. Back voiced her concerns about Schrader's use of partisan political affiliation in the composition of the review committee.** Mr. Schrader also stated that certain local governments would not receive funding because local officials were Democrats.
>
> The grant review committee met and evaluated approximately 224 federal Homeland Security grant applications in the summer of 2004. Ms. Back served as staff to the review committee. The recommendations of the review committee were made without regard to

partisan political affiliation, and were based on objective scoring criteria that were included in the competitive grant application packets that were publicly distributed to all potential applicants. The grant review committee scored the applications based on the criteria publicly shared with all applicants at the start of the application process.

Mr. Schrader received the recommendations of the review committee for federal Homeland Security Grants and conferred with officials in the Office of the Governor on the making of the final grant awards. A number of the grants recommended by the review committee on a non-partisan basis were rejected on partisan political grounds, and grants that were scored lower by the review committee were awarded over higher scoring grant proposals based on the partisan political affiliations of the grant applicants.

Mr. Schrader advised applicants that all interoperability communications equipment would be purchased from the sole source provider. This unilateral decision became a source of contentions between Mr. Schrader and the Louisville-Metro Government Management Division. Mr. Schrader later instructed Ms. Back to cease all contact with Louisville-Metro Government personnel regarding the FY 2004 federal grants.

Ms. Back voiced her concerns about the use of partisan political affiliation in

the awarding of federal Homeland Security grants.

In the summer of 2004, Executive Director Roberts requested that Ms. Back assist in developing questionnaires and rating sheets to evaluate potential employees based on their knowledge and experience in the area of administration of federal grants. Ms. Back complied with this request.

During the hiring process in the summer of 2004, it became evident that political affiliation was more important than knowledge and experience, and that prospective employees were asked about their political affiliation. **Ms. Back expressed her dismay that partisan politics would play such a role in hiring. After voicing her concerns about the role of partisan politics in hiring, Ms. Back was substantially excluded from the interview process.**

Previously, in August of 2004, Schrader had informed Ms. Back that KOHS would be approving purchases only from a sole source of interoperability communications equipment. Ms. Back voiced concerns about the use of a sole source for such a large component of the Homeland Security program without competitive bidding and compliance with the Model Procurement Code. Schrader's instructions to Ms. Back to cease contact with the Louisville-Metro Government regarding the FY 2004 federal grants was based on his dispute with Louisville-Metro over the sole

> source issue. **His directive to Ms. Back to cease communications with Louisville-Metro Government was a preliminary step toward Ms. Back's illegal termination for her voicing of legitimate concerns over Schrader's use of partisan political considerations in the administration of Homeland Security Grants.** (Emphasis added).

So the gravamen of Ms. Back's §1983 claim against defendant Joel Schader is that she was dismissed from her position for challenging and questioning Deputy Director Schrader's decisions and actions. As to Mr. Hall, the complaint only alleges that: (1) Keith A. Hall, a Republican, was appointed Executive Director of KOHS in November of 2004; and (2) Mr. Hall handed Ms. Back, a Democrat, a letter of dismissal.

Judge Hood found that all of Ms. Back's criticisms and complaints concerning Mr. Schrader's methods were made pursuant to her official duties for KOHS. Therefore, Judge Hood granted summary judgment against Ms. Back on her free-speech retaliation claim on grounds that she had not engaged in any protected First Amendment speech. See *Garcetti*, 126 S.Ct. at 1960 (holding that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline").

The district court's findings and conclusions concerning Ms. Back's free-speech retaliation claim are not at issue in this appeal. Rather, the issue in this appeal is whether Ms. Back met her burden of pleading an intent-based constitutional tort under 42 U.S.C. §1983 as to Hall. Ms. Back bears the burden of showing that Mr. Hall is not entitled to qualified immunity. Because Ms. Back failed to meet this burden, the district court erred in denying qualified immunity to Mr. Hall, and the Sixth Circuit erred in affirming the denial of qualified immunity.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

. . . it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. . . .

Judge Learned Hand

I. The pleading issue addressed in *Crawford-El* and its progeny remains unresolved because there is not an applicable standard for the District Courts to apply.

To make out a claim of discrimination based on political association, a public employee must allege (1) that the employee works for a public employer in a position that does not require a political affiliation, (2) that the employee maintained a political affiliation, and (3) that the employee's political affiliation was a substantial or motivating factor in the adverse employment decision. See, e.g., *Goodman v. Pennsylvania Turnpike Com'n,* 293 F.3d 655, 663-664 (3rd Cir. 2002). The case *sub judice*, involves a political affiliation claim in the wake of a gubernatorial election and administration change in Kentucky. Qualified immunity has been asserted as a defense, but the motion to dismiss the complaint was denied.

This Court has granted certiorari to several qualified immunity doctrine cases in recent terms, including *Morse v. Fredrick*, 127 S.Ct. 1618 (2007) and *Scott v. Harris*, 127 S.Ct. 1769 (2007). This Court has made the law clear in that there is no "heightened pleading standard," but left open what test actually applies when a qualified immunity defense is raised because instructing the District Courts to firmly apply the Federal Rules of Civil Procedure is no test at all. See *Crawford-El v. Britton*, 523 U.S. 574 (1998). In addition, this Court has set forth the requisites for a qualified immunity defense in *Saucier v. Katz*, 533 U.S. 194, 200-201 (2001). The two determinations

that must be made are (1) whether the facts alleged, taken in the light most favorable to the nonmovant, demonstrate the violation of a constitutional right, and (2) if so, then it must be determined whether the contours of the right were clearly established such that a reasonable person would understand that his actions violated that right. *Id.* This "order of battle" test has been severely criticized by nearly every member of this Court. See *Morse v. Fredrick*, 127 S.Ct. 1618 (2007) and *Scott v. Harris*, 127 S.Ct. 1769 (2007).

As to the first requisite of demonstrating a violation of a constitutional right, the allegations in the complaint must be sufficient "to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 127 S.Ct. 1955, 1974 (2007). Contrary to the statement of law in *Twombly*, a complaint need only give "a short and plain statement of the claim showing that the pleader is entitled to relief" under the Federal Rules of Civil Procedure 8(a)(2). In *Erikson v. Pardus*, 127 S.Ct. 2197, 2200 (2007) (per curium), a 2007 case that cited *Twombly*, the Court held "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erikson v. Pardus*, 127 S.Ct. 2197, 2200 (2007) (quoting *Bell Atl. Corp. v. Twombly,* 127 S.Ct. at 1964.) The Sixth Circuit adopted the rule in *Erikson v. Pardus* in their opinion affirming the denial of the motion to dismiss in this case.

Certiorari should be granted in order to clarify the pleading requirement when qualified immunity is raised as a defense to an unlawful discharge for political affiliation claim. *Erikson v. Pardus, infra*, involved a pro se prisoner in Colorado alleging violations of the Eighth and Fourteenth Amendments protections against cruel and unusual punishment. *Bell Atl. Corp. v. Twombly* involved a class of subscribers of local telephone and Internet services alleging violations of §1 of the Sherman Act.

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.

Bell Atl. Corp. v. Twombly, at 1964 (*citing*, *Sanjuan v. American Bd. of Psychiatry and Neurology, Inc.*, 40 F.3d 247, 251 (7th Cir. 1994)); see also *Papasan v. Allain*, 478 U.S. 265, 286 (1986). Factual allegations must be enough to raise a right to relief above the speculative level. See 5 C. Wright & A. Miller, Federal Practice and Procedure §1216, pp. 235-236 (3d ed. 2004) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"). In footnote 3, in *Twombly*, Justice Souter stated, "The dissent greatly oversimplifies matters by suggesting that the Federal Rules somehow dispensed with the pleading of facts altogether." *Twombly,* at 1965 (citing

Twombly, at 1979 (opinion of STEVENS, J.) (pleading standard of Federal Rules "does not require, or even invite, the pleading of facts").

> While, for most types of cases, the Federal Rules eliminated the cumbersome requirement that a claimant "set out *in detail* the facts upon which he bases his claim," *Conley v. Gibson,* 355 U.S. 41, 47 (1957) (emphasis added), Rule 8(a)(2) still requires a "showing," rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only "fair notice" of the nature of the claim, but also "grounds" on which the claim rests. See 5 C. Wright & A. Miller, Federal Practice and Procedure § 1202 (3d ed. 2004), at 94, 95 (Rule 8(a) "contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented" and does not authorize a pleader's "bare averment that he wants relief and is entitled to it").

Twombly, footnote 3, at 1965.

Qualified Immunity, under cases such as *Veney v. Hogan*, 70 F.3d 917 (6th Cir. 1995), was to be adjudicated at the earliest possible stage of litigation. Under *Veney*, after the assertion of qualified immunity, the plaintiff must amend his complaint to include specific, nonconclusory allegations of fact that will enable district court to determine that those facts, if proved, will overcome defense of qualified immunity. The Court in *Veney* quotes *Siegert v. Gilley*,

500 U.S. 226, 236 (1991) (Kennedy, J., concurring) stating, "avoidance of disruptive discovery is one of the very purposes for the official immunity doctrine, and it is no answer to say that the plaintiff has not yet had the opportunity to engage in discovery."

Under *Goad v. Mitchell*, 297 F.3d 497 (6th Cir. 2002), the Sixth Circuit abandoned *Veney*, because the U.S. Supreme Court's decisions in *Crawford-El v. Britton*, 523 U.S. 574 (1998) and in *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002). In *Goad*, the Court noted that the U.S. Supreme Court in *Crawford-El* "did, however, reiterate that in cases in which qualified immunity is raised as an affirmative defense, '*firm* application of the Federal Rules of Civil Procedure is fully warranted' and may lead to the prompt disposition of insubstantial claims (emphasis added)." *Crawford-El v. Britton*, 523 U.S. at 597, *quoting Harlow v. Fitzgerald*, 457 U.S. 800, 819-820 (1982).

The Court in *Goad* then stated the applicable Federal Rules of Civil Procedure, which the Court in *Crawford-El* indicated should be used to analyze pleadings after qualified immunity is raised. *Goad v. Mitchell*, 297 F.3d at 503-504. The *Crawford-El* Court referenced Federal Rules of Civil Procedure 7(a) and 12(e) as options for responding to a claim of qualified immunity. *Goad*, at 503-504. In *Crawford-El* the Supreme Court concluded its recommendation by stating, "[t]hus, the [district] court may insist that the plaintiff 'put forward specific, nonconclusory factual allegations' that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal . . . " *Crawford*, at 598

(*quoting Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring)). The *Crawford-El* court used nearly the same language used in *Veney*. However, the Sixth Circuit overruled *Veney*, as a result of a U.S. Supreme Court case which applies the exact same standard.

The Sixth Circuit stated in the opinion following this Defendant's interlocutory appeal that the Federal Rules of Civil Procedure require pleadings to set forth "'a short and plain statement showing that the pleader is entitled to relief,' and nothing about the defense of qualified immunity alters this modest pleading requirement." *Back v. Hall, et al.*, 537 F.3d 552 (6th Cir. 2008). The Court then cited *Goad* as the authority, and is seemingly denying the confusion that is clear in the opinion.

In footnote 6 of *Goad*, the Sixth Circuit noted "that there is still tension between the [Supreme Court's] endorsement of the notice pleading system delineated in Federal Rules of Civil Procedure 8(a) and 9(b) in *Swierkiewicz, Crawford-El,* and *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993) and the Court's dicta in *Crawford-El*. In fact, the language the *Crawford-El* Court quoted from Justice Kennedy's concurrence in *Siegert v. Gilley* regarding 'specific, nonconclusory factual allegations' refers to a heightened pleading requirement, which, Justice Kennedy explained, 'is a departure from the usual pleading requirements of Federal Rules of Civil Procedure 8 and 9(b) . . . ' *Siegert v. Gilley*, 500 U.S. 226, 235-236 (1991) (Kennedy, J., concurring)." *Goad*, at 504. The

Sixth Circuit, in *Goad*, could not have made the need for clarification more apparent. There is more than tension, there is confusion. Clarity is needed to prevent endless future interlocutory appeals, like in this case.

In this instant case, the Respondent has done nothing more than make a blanket assertion of entitlement to relief without any factual allegations beyond pleading the elements required to make out a claim of unlawful termination for political affiliation. However, because the District Courts do not have a clear, unambiguous test in which to apply, cases that have no merit are able to survive the pleading stage. The combination of *Crawford-El*'s adoption of utilizing the Federal Civil Procedure Rules to assess qualified immunity, and the "order of battle" rule in *Saucier* completely frustrates the purpose behind qualified immunity. Defendants are required to endure lengthy and costly discovery until the claim is defeated at the summary judgment stage. Certiorari is warranted to clarify the pleading requirement in unlawful termination for political affiliation claims when qualified immunity is raised as a defense, so that the District Courts have a clear, unambiguous standard by which to test complaints alleging such violations of law. This problem is more acute in light of the long-standing protective doctrine of qualified immunity.

II. Qualified immunity is a long standing rule of law, which has been recently diminished in its effect by changes in U.S. Supreme Court jurisprudence.

Qualified immunity exists to protect government officials from the burdens of discovery, trial, and judgment. The purpose is to insulate government officials so that they may discharge their duties without fear of reprisal. Qualified immunity notions date back as far as 1824 in *Osborn v. Bank of United States*, 22 U.S. 738 (1824). "The qualified immunity doctrine recognizes that officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated." *Davis v. Scherer*, 468 U.S. 183, 195 (1984). The doctrine should apply uniformly without regard to the precise nature of an official's duties or the precise character of the rights alleged to have been violated. *Anderson v. Creighton*, 483 U.S. 635, 642-643 (1987). Qualified immunity should not require disruptive inquiry into subjective intent, but should ensure that insubstantial suits are subject to dismissal prior to trial, and allow officials to predict when and under what circumstances they would be required to stand for trial. See *Davis v. Scherer*, 468 U.S. at 195.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court noted that application of the subjective element of the qualified immunity test had often produced results at odds with the doctrine's purpose.

Some courts had considered an official's subjective good faith to be a question of fact "inherently requiring resolution by a jury," making it impossible to accomplish the goal that "insubstantial claims" not proceed to trial. *Id.* at 816. Chief Justice Rehnquist recognized that "there were 'special costs' to inquiries into a government official's subjective good faith . . . such inquiries were 'broad-ranging,' intrusive, and personal, and were thought to be 'peculiarly disruptive of effective government.'" *Crawford-El v. Britton*, 523 U.S. 574, 601 (1998) (5-4 decision) (Rehnquist, C.J., dissenting) (quoting *Harlow v. Fitzgerald*, 457 U.S. at 816-817). The purpose of the holding in *Harlow*, according to Chief Justice Rehnquist, was to "purge" qualified immunity of subjectivity "so that it turned entirely on 'objective legal reasonableness' measured by the state of the law at the time of the challenged act. *Crawford-El v. Britton*, 523 U.S. at 604 (Rehnquist, C.J., dissenting) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 517 (1985) and *Harlow, supra*, at 819).

The qualified immunity doctrine was functionally overruled by the holding of the five justice plurality in *Crawford-El*, and the jurisprudential purpose of qualified immunity was abandoned. Furthermore, courts were once again permitted, if not required, to look to subjective factors, which is in clear contrast to the holding in *Harlow*. Chief Justice Rehnquist recognized that "It is not enough to say that because (1) the law in this area is 'clearly established,' and (2) this type of claim always turns on a defendant

official's subjective intent, that (3) qualified immunity is therefore never available." *Crawford-El*, at 604. The majority suggested that the *Wood v. Strickland*, 420 U.S. 308 (1975) subjective inquiry that was stripped from the qualified immunity analysis in *Harlow* is somehow different from the inquiry into subjective intent involved in resolution of a motive-based tort claim. *Crawford-El*, at 590-593. Any variance in the two subjective inquiries is a distinction without a difference for the purposes of qualified immunity. Both inquiries allow a plaintiff to probe the official's state of mind. The result is that qualified immunity is no longer consistent or predictable, and the administration of government is disrupted by protracted litigation.

The *Crawford-El* majority's logic signaled approval of protracted discovery and litigation, which clearly runs contrary to *Harlow*'s concern that insubstantial claims be prevented from going to trial. Most importantly, the *Crawford-El* holding ensures that officials will be subject to the disruptive inquiry into their subjective intent that the *Harlow* holding was designed to prevent. The Chief Justice foreshadowed the case now *sub judice* when he stated that the *Crawford-El* "rule would . . . allow plaintiffs to strip defendants of *Harlow*'s protections by a simple act of pleading – any minimally competent attorney (or *pro se* litigant) can convert any adverse decision into a motive-based tort, and thereby subject government officials to some measure of intrusion into their subjective worlds." *Id.* at 605.

The plaintiff in the case at issue filed suit based on the First Amendment and wrongful termination for political affiliation. The First Amendment claim was dismissed by the District Court and affirmed by the Sixth Circuit on the ground that the claim was not actionable under the recent case of *Garcetti v. Ceballos*, 547 U.S. 410 (2006). The speech at issue was made pursuant to the duties of the plaintiff's position, and was unprotected as a matter of law. The District Court denied the motion to dismiss the political affiliation claim, and the Sixth Circuit affirmed. The plaintiff's political affiliation was not speech made pursuant to her position, and is thus protected by the First Amendment. Qualified immunity was denied on the grounds that the plaintiff had adequately alleged a clearly established constitutional violation. The Sixth Circuit held:

> Were this appeal before us in the context of the denial of a summary judgment motion, we might entertain their argument. But it is not. Because we are here at the pleading stage of this case, and because there is no 'heightened pleading requirement . . . for civil rights plaintiffs in cases in which the defendant raises the affirmative defense of qualified immunity,' [the plaintiff] was not required to plead her prima facie case. It sufficed to allege that she was fired because of her political affiliation in violation of the First Amendment (citations omitted). *Back v. Hall et al.*, 537 F.3d 552 (6th Cir. 2008).

The Sixth Circuit follows the holding in *Crawford-El*, in *Goad v. Mitchell*, 297 F.3d 497 (6th Cir. 2002). However, the Sixth Circuit, in footnote 6, stated in *Goad* that:

> . . . there is still tension between the [Supreme Court's] endorsement of the notice pleading system delineated in Federal Rules of Civil Procedure 8(a) and 9(b) . . . and the Court's dicta in *Crawford-El*. In fact, the language the *Crawford-El* Court quoted from Justice Kennedy's concurrence in *Siegert v. Gilley* regarding 'specific, nonconclusory factual allegations' refers to a heightened pleading requirement, which, Justice Kennedy explained, 'is a departure from the usual pleading requirements of Federal Rules of Civil Procedure 8 and 9(b) . . .

Goad, at 504; citing *Siegert v. Gilley*, 500 U.S. 226, 235-236 (1991) (Kennedy, J., concurring).

The Sixth Circuit recognizes that there is confusion as to the proper application of qualified immunity in civil rights cases. Qualified immunity cannot be confusing, inconsistent, or unpredictable, because the administration of all levels of state government depends upon the protection from frivolous litigation.

In footnote 2 of Chief Justice Rehnquist's dissent, he noted that the majority's opinion "threatens to 'Balkanize' the rule of qualified immunity." *Crawford-El*, at 605 (*citing*, *Anderson v. Creighton*, 483 U.S. 635, 643 and 646 (1987)). In *Anderson*, the Court stated:

> [W]e have been unwilling to complicate qualified immunity analysis by making the scope or extent of immunity turn on the precise nature of various officials' duties or the precise character of the particular rights alleged to have been violated. An immunity that has as many variants as there are modes of official action and types of rights would not give conscientious officials that assurance of protection that it is the object of the doctrine to provide. *Anderson v. Creighton*, 483 U.S. 635, 643 and 646 (1987).

The majority argued that the "social costs that adequately justified the elimination of the subjective component of an affirmative defense do not necessarily justify serious limitations upon the only necessarily realistic remedy for the violation of constitutional guarantees." *Crawford-El*, at 591. The majority forgets the oft cited quote of Judge Learned Hand. The jurisprudence of qualified immunity stands in the shadow of the reality that there may in fact be some meritorious claims that go unheard. Chief Justice Rehnquist recognized this fact, but stated that "it is not a sufficient reason to refuse to apply the doctrine." *Id.* at 606. A doctrine that did not have far more benefit than cost would not have survived as long as qualified immunity.

Certiorari is warranted and necessary. The instant case is a prime example of the reality that exists in the wake of *Crawford-El*. A plaintiff has avoided dismissal and has stripped this Petitioner of the protection of *Harlow* by simply pleading that

political affiliation was the basis for the employment termination. *Garcetti* required the dismissal of the plaintiff's freedom of speech claim, but the plaintiff is able to continue to pursue this litigation because the complaint alleges political affiliation discrimination. If ever qualified immunity had necessity, it is here. Government employers, be they Democrats, Republicans, Independents, Libertarians, etc., must necessarily make employment decisions. Inevitably, some employees will be registered as a member of a different political party as their superiors. Section 1983 was not intended to provide a cause of action whenever persons of an opposing political party are terminated by an employer of another party. This is exactly the type of case that requires the consistent and predictable application of qualified immunity, which cannot be had under the current jurisprudence.

III. Public officials and Federal District Court judges should be supplied with a rule that can be applied consistently and predictably, and the formulation for applying the qualified immunity doctrine proposed by the dissenters of *Crawford-El v. Britton* should now be adopted by this Court.

Justice Scalia noted that "[w]e find ourselves engaged, therefore, in the essentially legislative activity of crafting a sensible scheme of qualified immunities for the statute we have invented – rather than applying the common law embodied in the

statute that Congress wrote." *Crawford-El*, at 611-612. Justice Scalia preferred the approach suggested by Judge Silberman's concurring opinion in the Court of Appeals, which extended the "objective reasonableness" test of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), to qualified immunity insofar as it relates to intent-based constitutional torts.

The Chief Justice, in his dissent in *Crawford-El*, set forth a test to be applied when a plaintiff alleges that an official's action was taken with an unconstitutional or otherwise unlawful motive. The defendant would be entitled to immunity and immediate dismissal of the suit if he can offer a lawful reason for his action, and the plaintiff cannot establish, through objective evidence, that the offered reason is actually a pretext. *Crawford-El*, at 605.

The test proposed by Chief Justice Rehnquist was "'along the lines suggested by Judge Silberman,' but that differs in a significant respect: It would allow the introduction of "objective evidence" that the constitutionally valid reason offered for the complained-of action 'is actually a pretext.'" *Id.* at 612. The introduction of objective evidence regarding the state official's subjective intent – for example, remarks showing that he had a partisan-political animus against the plaintiff – produces a less subjective-free immunity than the one established by *Harlow*. *Id.* The test Justice Scalia favored "would apply a similar rule here: once the trial court finds that the asserted grounds for the official action were objectively valid (*e.g.*, the person fired for alleged

incompetence was indeed incompetent), it would not admit any proof that something other than those reasonable grounds was the genuine motive (*e.g.*, the incompetent person fired was a Republican)." *Id.* This is of course a more severe restriction upon "intent-based" constitutional torts. *Id.* Justice Scalia was less put off by that consequence than some may be, since I believe that *no* "intent-based" constitutional tort would have been actionable under the §1983 that Congress enacted. *Id.*

In the instant case, it is clear, even from the facts alleged in the complaint, that the Petitioner would be entitled to qualified immunity under both Justice Scalia's and Chief Justice Rehnquist's tests. However, the co-defendant, Joel Schrader would not be entitled to qualified immunity under Chief Justice Rehnquist's test, because it seems from the complaint that the plaintiff could come forward with objective evidence to show that Schrader's lawful reason is merely a pretext. Being able to contrast the two defendants in this case illustrates the problem with the current qualified immunity jurisprudence. Qualified immunity has been emasculated by *Crawford-El* and its progeny, despite the clear and long-standing value associated with the doctrine.

The costs of the extension of *Harlow* proposed would be minor. Justice Scalia's proposed rule would have supplied officials with the consistency and predictability that *Harlow* and its progeny have identified as an underlying purpose of qualified immunity doctrine, without eliminating motive-based

torts altogether. *Id.* at 609. The *Crawford-El* majority's solution, which is dependent on the varying approaches of 700-odd district court judges, has not provided any consistency or clarity to the Circuits. *Id.* In an ideal legal system, the District Court Judges could consistently craft creation solutions with the Federal Rules. In reality, qualified immunity has been diminished from an important hurdle to a doctrine that must merely be side-stepped through minimal pleading of blanket allegations and conclusory averments. The problematic issues involved in the "order of battle" rule in *Saucier v. Katz* would be resolved by the adoption of a new test for qualified immunity. Resolving the qualified immunity issue is immensely important for the proper functioning of government. The complex determination required by *Saucier*, and the ineffective support of using the Federal Rules of Civil Procedure to address qualified immunity has completely frustrated the District Courts and has emasculated qualified immunity. This Court should grant Certiorari in order to adopt Justice Scalia's test for qualified immunity in motive-based torts under §1983.

CONCLUSION

The long-standing doctrine of qualified immunity should not be side-stepped by a plaintiff's ability to plead blanket allegations, conclusory averments, and simply restating the elements of an intent-based constitutional tort. In the instant case, which is a prime example of the need for a strict application of

the doctrine of qualified immunity, the plaintiff has been able to avoid dismissal by simply pleading that a person of another political party was her superior, and she was terminated. That is simply not enough to embroil a government official in a long and protracted legal dispute. Chief Justice Rehnquist, Justices Scalia, Thomas and O'Conner all recognized the problem associated with the dilution of qualified immunity through their dissents of the *Crawford-El* majority's opinion. After ten years of waiting for the Federal Rules to be amended to include motive-based torts in the list of actions that must be specifically pleaded, it is clear that such a change is not forth coming. The additional problems associated with the "order of battle" rule in *Saucier* will also be resolved by adopting a new test for determining the applicability of qualified immunity. Therefore, this Court should grant Certiorari to adopt a strict test of qualified immunity, which clearly establishes the pleading requirements for an intent-based constitutional tort, including political affiliation claims, when the defense of qualified immunity is raised.

Respectfully submitted,

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 08a0286p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LINDA WELLS BACK, *Plaintiff-Appellee,* *v.* KEITH A. HALL (07-5934) and JOEL SCHRADER (07-5935), *Defendants-Appellants.*	Nos. 07-5934/5935

Appeal from the United States District Court
for the Eastern District of Kentucky at Frankfort.
No. 06-00005 – Joseph M. Hood, District Judge.

Argued: July 24, 2008

Decided and Filed: August 11, 2008

Before: MOORE and SUTTON, Circuit Judges; ALDRICH, District Judge.*

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* The Honorable Ann Aldrich, United States District Judge for the Northern District of Ohio, sitting by designation.

COUNSEL

ARGUED: Laurence J. Zielke, ZIELKE LAW FIRM, Louisville, Kentucky, William C. Hurt, Jr., Hurt, CROSBIE & MAY, Lexington, Kentucky, for Appellants. Thomas E. Clay, LAW OFFICES, Louisville, Kentucky, for Appellee. **ON BRIEF:** Laurence J. Zielke, Nancy J. Schook, ZIELKE LAW FIRM, Louisville, Kentucky, William C. Hurt, Jr., Aaron Davis Reedy, HURT, CROSBIE & MAY, Lexington, Kentucky, for Appellants. Thomas E. Clay, LAW OFFICES, Louisville, Kentucky, for Appellee.

OPINION

SUTTON, Circuit Judge. In 2003, while a Democrat occupied the Kentucky governor's mansion, Linda Back, a registered Democrat, received a civil-service position in the Kentucky Office of Homeland Security. In 2005, one year after a Republican administration took the reins of State government, Keith Hall and Joel Schrader, Back's supervisors, fired her. Back sued them under 42 U.S.C. § 1983, alleging that they fired her based on protected speech and political affiliation in violation of the First (and Fourteenth) Amendment. Before discovery commenced, the defendants asserted qualified immunity, which the district court granted as to Back's freedom-of-speech claims but denied as to Back's political-affiliation claims. Hall and Schrader seek

interlocutory review of the district court's political-affiliation decision, and we affirm.

I.

As is always the case when we review a Rule 12(b)(6) or Rule 12(c) decision, we accept the facts as the plaintiff, here Linda Back, has pleaded them. On February 16, 2003, the Kentucky Office of Homeland Security hired Back as a Grants and Contracts Administrator, a position protected by Kentucky's civil-service statute. Beginning in December 2003, during the State's transition from a Democratic to a Republican administration, there was considerable turnover within the Office. As "the only [civil-service] system employee of the office throughout the gubernatorial transition period," Back was given "an increasing level of administrative responsibility." JA 17. Under the guidance of the newly appointed Executive Director, Erwin Roberts, Back trained new employees and maintained responsibility for processing and administering the agency's federal homeland-security grant applications. Through the ensuing spring and summer, Roberts noticed the increased responsibility Back had undertaken and talked to her about "upgrading her position." JA 20.

Despite Back's good relationship with Roberts, tensions developed between Back and other Republican-appointed supervisors. On April 16, 2004, Joel Schrader became the Deputy Director of the Office, and, according to Back, he "repeatedly invoked

partisan political considerations in the process of awarding Federal Homeland Security grants, and in the hiring of personnel." JA 18. He once told Back that "certain local governments would not receive funding because local officials were Democrats." JA 19. Back says that she repeatedly "voiced her concerns" about Schrader's partisan maneuvering, JA 19-20, and that he retaliated by "substantially exclud[ing]" her from the process of interviewing prospective employees, JA 20.

When Roberts decided to give Back a promotion, he suggested she take a Principal Assistant position, but Back responded that she did not want to accept a non-civil-service – a political – job. Roberts then offered Back a civil-service position as a Branch Manager, but he soon changed his mind because that position "required direct involvement with Deputy Director Schrader," and he told Back, "trust me, you don't want" that position. JA 21. Roberts eventually appointed Back to another civil-service position, that of Internal Policy Analyst III, and on September 1, 2004, Back resigned from her old position in order to start her new one. Even after this change, Back continued to clash with Schrader over his administration of federal grants.

Unfortunately for Back, Roberts left the agency in October 2004, and Keith Hall, a former lobbyist, eventually replaced him as Executive Director. On the afternoon of January 19, 2005, Schrader and Hall met with Back and handed her a letter terminating her employment.

On January 17, 2006, Back filed this lawsuit in the Eastern District of Kentucky against Hall, Schrader, Alecia Webb-Edgington (Kentucky's Director of Homeland Security) and the Commonwealth of Kentucky, alleging that Hall and Schrader violated her First Amendment and state-law rights by terminating her "by reason of her political affiliation as a Democrat" and "in retaliation for her" vocal complaints of Schrader's "use of partisan political considerations." JA 23.

The district court dismissed Back's suit against the Commonwealth and against Webb-Edgington and dismissed Back's state-law claims because she had failed to exhaust her administrative remedies. At the same time, the court denied Hall's and Schrader's motions to dismiss Back's First Amendment claims. After the judge who was initially assigned the case recused herself, Hall filed a motion to reconsider, and Schrader filed a motion for judgment on the pleadings based on *Garcetti v. Ceballos*, 547 U.S. 410 (2006). Relying on *Garcetti*, the district court dismissed Back's freedom-of-speech claims, holding that Back's complaints "were made pursuant to the duties of her position" and were "therefore unprotected as a matter of law." JA 31. But the court denied the defendants' request for qualified immunity on Back's political-affiliation claims, holding that Back had adequately alleged a clearly established constitutional violation. The defendants appealed.

II.

Interlocutory appeals normally fall outside our reach, but because Hall and Schrader seek review of "an order rejecting the defense of qualified immunity," that denial is "a 'final' judgment subject to immediate appeal." *Behrens v. Pelletier*, 516 U.S. 299, 307 (1996). That we give expedited review to qualified-immunity claims, however, does not mean that we give more exacting review to those claims. Just as we gauge other pleading-stage dismissals to determine only whether the complaint states a claim upon which relief can be granted, *see* Fed. R. Civ. P. 12(b)(6), so we review an assertion of qualified immunity to determine only whether the complaint "adequately alleges the commission of acts that violated clearly established law," *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *see also Skousen v. Brighton High Sch.*, 305 F.3d 520, 527 (6th Cir. 2002). The Federal Rules of Civil Procedure require pleadings to set forth "a short and plain statement showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a), and nothing about the defense of qualified immunity alters this modest pleading requirement, *see Goad v. Mitchell*, 297 F.3d 497, 503 (6th Cir. 2002).

Measured by this yardstick, Back's political-affiliation allegations suffice, and neither Hall nor Schrader is entitled to qualified immunity at this early stage of the case. Taking the complaint's allegations at their word, we look to whether any constitutional right was violated and to whether that right was clearly established. *Saucier v. Katz*, 533 U.S. 194,

200-01 (2001). Back alleges that she was a civil-service employee and that her supervisors fired her "because of" and "by reason of her political affiliation as a Democrat." JA 23. These allegations clear both of *Saucier*'s hurdles: They adequately plead a constitutional violation – one that has been clearly established for some time.

As to the first hurdle, current and aspiring public employees have the First Amendment right to be free from hiring and firing practices based on political affiliation unless "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti v. Finkel,* 445 U.S. 507, 518 (1980); *see also Elrod v. Burns,* 427 U.S. 347, 355 (1976) (plurality opinion); *id.* at 375 (Stewart, J., concurring); *Rutan v. Republican Party of Ill.,* 497 U.S. 62, 79 (1990) (holding that *Elrod* and *Branti* apply to government promotion and hiring practices as well as to firing practices). To determine whether occupants of (or applicants for) a particular office are protected from political retaliation under *Branti,* we "examine the inherent duties of that position," *Cope v. Heltsley,* 128 F.3d 452, 460 (6th Cir. 1997) (internal quotation marks omitted), and positions that exercise "no discretion of political significance" are generally entitled to First Amendment protection, *McCloud v. Testa,* 97 F.3d 1536, 1559 (6th Cir. 1996).

So far as this complaint is concerned, Back's former position falls within the category of offices for which political affiliation is irrelevant. According to

the complaint, Back set up the process for evaluating grant applications, performed other administrative tasks and assisted the grant-review committee. The Kentucky legislature also seems to believe that political affiliation is not relevant to those duties: Back's position was classified under Kentucky's civil-service statute, *see* Ky. Rev. Stat. Ann. § 18A.115 (exempting certain state employment offices, though not Back's position, from coverage), and Kentucky law says that "[n]o person shall be appointed or promoted to, or demoted or dismissed from" such classified positions based on "political . . . affiliations," *id.* § 18A.140(1). We have long given presumptive deference to a state legislature's determination that a position "should be classified as . . . nonpolitical," *Rice v. Ohio Dep't of Transp.*, 14 F.3d 1133, 1143 (6th Cir. 1994), and, at least at this stage of the proceedings, the administrators have given us no reason to second guess that body's judgment. Nor has Hall or Schrader identified any component of Back's job description for which political ideology bears on "the effective performance of [her] office." *Branti*, 445 U.S. at 518. Back's complaint, in short, alleges a cognizable First Amendment claim.

As to the second hurdle, Back's right to be free from termination based on her political affiliation was "clearly established . . . in a particularized sense" such that no "reasonable official in the [administrators'] position could have believed [such] conduct was lawful." *Cope*, 128 F.3d at 458-59 (internal quotation marks omitted). As of the date of Back's termination,

Sixth Circuit precedent established at the least that an administrative employee like Back, who "simply perform[s] functions over which he or she has no discretion, or no discretion of political significance," is entitled to First Amendment protection. *McCloud,* 97 F.3d at 1559 (affirming the denial of qualified immunity regarding the firing of various mid-level administrators); *see also Caudill v. Hollan,* 431 F.3d 900, 909-10 (6th Cir. 2005) (holding that deputy clerks who perform "essentially clerical" tasks were protected). Back has therefore met her pleading-stage burden and "allege[d] the commission of acts that violated clearly established law." *Mitchell,* 472 U.S. at 526.

The defendants' attempt to muddy these waters is not persuasive. They argue that any constitutional protection Back enjoyed could not have been clearly established because, as in *Cope,* "there was no published decision . . . holding that political compatibility is not . . . an appropriate requirement for [her former] position." 128 F.3d at 460 (internal quotation marks omitted). In one sense, they are right. Neither we nor the Supreme Court has ever held that the Internal Policy Analyst III job in the Kentucky Office of Homeland Security is a nonpolitical job.

But in a more fundamental way, they are wrong. The absence of such a precise holding does not prevent the relevant law from being clearly established, even in the particularized sense that our case law requires. We have previously rejected "the notion that there must be a separate patronage dismissal

decision . . . involving a particular position before qualified immunity can be denied." *McCloud,* 97 F.3d at 1556.

Nor is *Cope* to the contrary. It dealt with deputy county clerks who *were not protected* by the civil service system, *see* 128 F.3d at 460, and therefore a precise holding was needed to rebut the presumption that unclassified positions fall within the *Branti* exception for political positions, *see id.* at 459; *see also McCloud,* 97 F.3d at 1542 (interpreting *Rice* to mean that the *Branti* exception "is to be construed broadly, so as presumptively to encompass positions placed by the legislature outside of the 'merit' civil service").

In fighting this distinction, the supervisors point to Back's probationary status, *see* Ky. Rev. Stat. Ann. § 18A.111, and to the fact that the Kentucky Supreme Court once said (in dicta and not in the context of a First Amendment case) that probationary employees could be fired "for any reason, political or otherwise," *Miracle v. Gable,* 452 S.W.2d 399, 400 (Ky. 1970). A reasonable officer, they claim, could thus believe that Back was not protected from a patronage dismissal. But *Miracle* did not interpret the civil-service statute governing Back's employment (it interpreted a no-longer-governing Personnel Department Rule), *see id.*, and the current statute protects even probationary employees from discrimination on the basis of political affiliation, *see* Ky. Rev. Stat. Ann. § 18A.111(1) (allowing probationary employees to appeal "as provided by KRS 18A.095"); *id.* § 18A.095(15)(a) (allowing administrative appeals based on "discriminat[ion]");

id. § 18A.140(1) (prohibiting political discrimination). The *Branti* exception, moreover, turns on whether a particular *"position"* may be deemed political, 445 U.S. at 518 (emphasis added), which we determine by looking to its "inherent duties," *Cope,* 128 F.3d at 460, not to the employee's tenure in that job or to her right to that job's continued existence, *cf. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 283-84 (1977) ("Even though [a non-tenured teacher] could have been discharged for no reason . . . he may nonetheless establish a claim to reinstatement if the decision . . . was made by reason of his exercise of constitutionally protected First Amendment freedoms."). It may well be that a probationary employee, like an at-will employee, may be fired for no reason or most any reason; she just cannot be fired for "an unconstitutional reason." *See Morris v. Crow,* 142 F.3d 1379, 1381 (11th Cir. 1998).

Hall and Schrader separately argue that Back has failed to establish a prima facie case of political-affiliation dismissal. Were this appeal before us in the context of the denial of a summary judgment motion, we might entertain their argument. But it is not. Because we are at the pleading stage of this case, and because there is no "heightened pleading requirement . . . for civil rights plaintiffs in cases in which the defendant raises the affirmative defense of qualified immunity," *Goad,* 297 F.3d at 503; *see also Crawford-El v. Britton,* 523 U.S. 574, 589 (1998), Back was not required to plead her prima facie case, *cf. Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 511 (2002)

(holding in a Title VII case that "it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply" when there is "direct evidence of discrimination"). It sufficed to allege that she was fired because of her political affiliation in violation of the First Amendment.

Hall and Schrader protest that Back's allegation that she was terminated "because of her political affiliation," JA 23, is conclusory. But as the Supreme Court has recently made clear, the conclusory nature of particular allegations cannot alone justify dismissing a complaint. *See Erickson v. Pardus*, ___ U.S. ___, 127 S. Ct. 2197, 2200 (2007). Eventually, Back will need to establish *with evidence* that her Democratic affiliation was a "substantial" or "motivating" factor in each administrator's decision to terminate her. *Mt. Healthy*, 429 U.S. at 287; *see also Conklin v. Lovely*, 834 F.2d 543, 546-47 (6th Cir. 1987) (applying *Mt. Healthy*'s "substantial" or "motivating" factor test to patronage dismissal claims). And if she meets that burden, then the defendants will need to show that they would have fired her anyway, even if she were a Republican. *Mt. Healthy*, 429 U.S. at 287. But for now, at the pleading stage, it suffices that Back alleged that she "was terminated by defendants Hall and Schrader by reason of her political affiliation as a Democrat." JA 23.

III.

For these reasons, we affirm.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
Frankfort Division
No. 3:06-CV-05 KKC

LINDA WELLS BACK **PLAINTIFF**

v.

KEITH A. HALL (individually and in his Official Capacity as former Director of the Kentucky Office of Homeland Security);
Serve: Keith A. Hall
441 Brightview Drive
Simpsonville, Kentucky 40067-6565
(last known address), and
Attorney General
Gregory D. Stumbo
State Capitol, Suite 118,
700 Capital [sic] Ave.
Frankfort, Kentucky 40601

JOEL SCHRADER (individually and in his Official Capacity as Deputy Director of the Kentucky Office of Homeland Security)
Serve: Joel Schrader,
600 Bridgeport Road
Frankfort, Kentucky 40601; and
Attorney General
Gregory D. Stumbo
State Capitol, Suite 118,
700 Capital [sic] Ave.
Frankfort, Kentucky 40601

MAJOR ALECIA WEBB-EDGINGTON, in her Official Capacity as Director of the Kentucky Office of Homeland Security,
Office of Homeland Security
Serve: Attorney General
Gregory D. Stumbo
State Capitol, Suite 118,
700 Capital [sic] Avenue
Frankfort, Kentucky 40601

UNKNOWN DEFENDANTS and

COMMONWEALTH OF KENTUCKY, OFFICE OF HOMELAND SECURITY — **DEFENDANTS**
Serve: Attorney General
Gregory Stumbo
State Capitol, Room 118
700 Capital [sic] Avenue
Frankfort, Kentucky 40601

(Filed Jan. 17, 2006)

INTRODUCTION

1. This is a civil rights action brought by Linda Wells Back for the violation of her First Amendment rights as a result of her termination from employment from a merit system position in the Kentucky Office of Homeland Security due to her political affiliation. Ms. Back seeks compensatory and punitive damages and injunctive relief under 42 U.S.C. §1983, as well as under state law. The defendants are the former Director of Homeland Security, Keith A.

Hall, the Deputy Director of Homeland Security, Joel Schrader, the current Director of Homeland Security (Major Alecia Webb-Edgingon [sic], who is named in her official capacity, for purposes of injunctive relief only), any unknown defendants (whose identities are unavailable to the plaintiff at this time) who participated in the illegal firing of Ms. Back, and the Commonwealth of Kentucky, Office of Homeland Security.

Jurisdiction and Venue

2. This Court has jurisdiction over this matter under 28 U.S.C. §1331, since this matter arises under the 1st and 14th Amendments to the Constitution of the United States and 42 U.S.C. §1983. This Court has supplemental jurisdiction over the plaintiff's state law claims under 28 U.S.C. §1367.

3. Venue is appropriate in this District, and in the Frankfort Division, under 28 U.S.C. §1391(b).

Parties

4. Linda Wells Back is a citizen of the United States, who resides in Frankfort, Kentucky. She was employed as a merit system employee in the Office of Homeland Security from February 16, 2003 through January 19, 2005. Ms. Back is a registered Democrat.

5. Keith Hall is the former Director of Homeland Security for the Commonwealth of Kentucky. He

is sued individually and in his official capacity. Mr. Hall is a registered Republican.

6. Joel Schrader is the Deputy Director of Homeland Security for the Commonwealth of Kentucky. He resides at xxx xxxxxxxxxx xxxx, xxxxxxxxx, xxxxxxxx xxxxx. He is sued individually and in his official capacity. Mr. Schrader is a registered Republican, and a former Republican nominee for the office of state representative.

7. Major Alecia Webb-Egdington [sic] is the Director of Homeland Security for the Commonwealth of Kentucky. Her office address is xxx xxxx xxxxxx, xxxxxxxxx, xxxxxxxx xxxxx. She is sued only in her official capacity, for purposes of prospective injunctive relief.

8. On information and belief, there may be additional UNKNOWN DEFENDANTS whose identities are as yet unknown to the plaintiff who may have participated in the decision to illegally terminate the plaintiff from employment.

9. Commonwealth of Kentucky, Office of Homeland Security (OHS) is the administrative agency of state government that employed the plaintiff from on or about February 16, 2003 through January 19, 2005. OHS is sued for prospective injunctive relief. On information and belief, Jamie Link, acted as appointing authority for OHS in signing the letter terminating the plaintiff's employment.

Facts

10. Ms. Back was employed as a grants and contracts administrator with the Office of Homeland Security (OHS) on or about February 16, 2003, as a classified employee under KRS Chapter 18A, the Kentucky Merit System statute. Ms. Back reported to Col. Ray A. Nelson, who was executive director of OHS at that time.

11. Ms. Back received excellent evaluations from her supervisor, and successfully completed her probationary period.

12. Following the change in gubernatorial administrations in December of 2003, Ms. Back continued to work as a merit system employee of OHS, coordinating and tracking homeland security grants under the supervision of Col. Nelson. The other employees of OHS were all non-merit appointees, and resigned their positions upon the change in gubernatorial administrations from Democratic Governor Paul Patton to Republican Governor Ernie Fletcher. Col. Nelson continued to serve as Executive Director through the transition period.

13. In March of 2004, Col. Nelson was replaced as Executive Director of OHS by Erwin Roberts, an appointee of Governor Ernie Fletcher.

14. Both Col. Nelson and Mr. Roberts assigned an increasing level of administrative responsibility to Ms. Back, who was the only merit system employee of the office throughout the gubernatorial transition

period. At all times throughout her employment with OHS, Ms. Back remained within the classified service under KRS Chapter 18A.

15. Ms. Back never held any policy-making position or job duties within OHS.

16. On or about May 24, 2004, OHS became the state administrative agency for Homeland Security federal grants, through an executive order signed by Gov. Fletcher.

17. Throughout the first six months of grants administration at OHS, Ms. Back had responsibility for the day-to-day administrative tasks of processing federal grant applications and funding for the office, as well [sic] maintaining all of her other previously assigned administrative duties. Executive Director Roberts requested that Ms. Back develop a competitive grant application for the Fiscal Year (FY) 2004 federal Homeland Security grants that were to be awarded by OHS to local governments.

18. As the incoming Republican administration hired personnel to staff OHS, Ms. Back took a significant role in training the new employees in policies and procedures, and in requirements for administering the federal grants under which OHS was operated and funded.

19. All of the new employees who were hired by the new gubernatorial administration in 2004, and who were trained by Ms. Back, received salaries higher than Ms. Back's salary, although Ms. Back had

more duties and responsibilities than the new employees.

20. On or about April 16, 2004, Joel Schrader, a former Republican political candidate, was hired to be the deputy director of OHS.

21. From the time of Mr. Schrader's hiring, until the termination of Ms. Back, Mr. Schrader repeatedly invoked partisan political considerations in the process of awarding federal Homeland Security grants, and in the hiring of personnel to administer the Homeland Security program.

22. Executive Director Roberts, during the Spring of 2004, assigned Ms. Back the task of setting up the competitive grant application process, including a committee to review grant applications for federal Homeland Security Grants to local governments. Ms. Back recommended a slate of highly qualified persons to serve on the review committee without regard to political affiliation. Nevertheless, Mr. Schrader demanded the removal of persons and organizations from the review committee based on their partisan political affiliation. Ms. Back voiced her concerns about Schrader's use of partisan political affiliation in the composition of the review committee. Mr. Schrader also stated that certain local governments would not receive funding because local officials were Democrats.

23. The grant review committee met and evaluated approximately 224 federal Homeland Security grant applications in the summer of 2004. Ms. Back

served as staff to the review committee. The recommendations of the review committee were made without regard to partisan political affiliation, and were based on objective scoring criteria that were included in the competitive grant application packets that were publicly distributed to all potential applicants. The grant review committee scored the applications based on the criteria publicly shared with all applicants at the start of the application process.

24. Mr. Schrader received the recommendations of the review committee for federal Homeland Security Grants and conferred with officials in the Office of the Governor on the making of the final grant awards. A number of the grants recommended by the review committee on a non-partisan basis were rejected on partisan political grounds, and grants that were scored lower by the review committee were awarded over higher scoring grant proposals based on the partisan political affiliations of the grant applicants.

25. Mr. Schrader advised applicants that all interoperability communications equipment would be purchased from a sole source provider. This unilateral decision became a source of contention between Mr. Schrader and the Louisville-Metro Government Emergency Management Division. Mr. Schrader later instructed Ms. Back to cease all contact with Louisville-Metro Government personnel regarding the FY 2004 federal grants.

26. Ms. Back voiced her concerns about the use of partisan political affiliation in the awarding of federal Homeland Security grants.

27. In the summer of 2004, Executive Director Roberts requested that Ms. Back assist in developing questionnaires and rating sheets to evaluate potential employees based on their knowledge and experience in the area of administration of federal grants. Ms. Back complied with this request.

28. During the hiring process in the summer of 2004, it became evident that political affiliation was more important than knowledge and experience, and that prospective employees were asked about their political affiliation. Ms. Back expressed her dismay that partisan politics would play such a role in hiring. After voicing her concerns about the role of partisan politics in hiring, Ms. Back was substantially excluded from the interview process.

29. During the Spring and Summer of 2004, Executive Director Roberts spoke with Ms. Back about upgrading her position to reflect the added duties and responsibilities she had undertaken at his request, including the training of employees who were paid more than Ms. Back. He initially suggested that Ms. Back accept a Principal Assistant (Grade 17) position, but Ms. Back expressed hesitancy to accept a non-merit job. Mr. Roberts then agreed to upgrade Ms. Back's position to a merit system position of branch manager (Grade 16).

30. In August of 2004, Mr. Roberts advised Ms. Back that she would be appointed to the position of Internal Policy Analyst III (another merit system position), rather than the branch manager position he had previously discussed with her. Mr. Roberts advised her not to take the branch manager position, which required direct involvement with Deputy Director Schrader in the distribution of federal funds. Mr. Roberts stated to Ms. Back "trust me, you don't want it", referring to the branch manager position.

31. Ms. Back, on the advice of Mr. Roberts, resigned her position as grants and contracts administrator, and accepted the position of Internal Policy Analyst III, effective September 1, 2004. That position was also a classified position under KRS Chapter 18A.

32. In October of 2004, Executive Director Roberts announced that he had accepted a position at the Environmental and Public Protection Cabinet, and he left the OHS shortly thereafter.

33. In November of 2004, defendant Keith A. Hall was appointed Executive Director of OHS. Mr. Hall had formerly been a lobbyist and Republican political operative.

34. In December of 2004, Deputy Director Schrader instructed Ms. Back to cease contact with the Louisville-Metro Government regarding the FY 2004 federal grants.

35. Previously, in August of 2004, Schrader had informed Ms. Back that OHS would be approving purchases only from a sole source for interoperability communications equipment. Ms. Back voiced concerns about the use of a sole source for such a large component of the Homeland Security program without competitive bidding and compliance with the Model Procurement Code. Schrader's instruction to Ms. Back to cease contact with the Louisville-Metro Government regarding the FY 2004 federal grants was based on his dispute with Louisville-Metro over the sole source issue. His directive to Ms. Back to cease communications with Louisville-Metro Government was a preliminary step toward Ms. Back's illegal termination in retaliation for her voicing of legitimate concerns over Schrader's use of partisan political considerations in the administration of Homeland Security Grants.

36. On Wednesday, January 19, 2005, Ms. Back was notified by Deputy Director Schrader that she was to meet with Executive Director Hall at 4:00 p.m., and that she was not to attend the grants application meeting that day with other grants managers. She was advised that the meeting had to do with the Urban Area Security Initiative Grant. At the 4:00 p.m. meeting with Hall and Schrader, Ms. Back was advised that she had been terminated from employment and she was instructed to clean out her desk and return her identification badge and parking pass. At this meeting with Hall and Schrader, Ms. Back was handed a termination letter signed by

Jamie Link, Appointing Authority for OHS, stating that "you will be terminated from the position of Internal Policy Analyst III, effective close of business January 19, 2005." (Copy attached as Exhibit 1).

37. On information and belief, Ms. Back was terminated by defendants Hall and Schrader by reason of her political affiliation as a Democrat, and in retaliation for her exercise of her First Amendment rights to voice her concerns over the use of partisan political considerations in the making of Homeland Security grants with federal funds.

38. On information and belief, additional UNKNOWN DEFENDANTS whose identities are unavailable to the plaintiff at this time, participated in the decision of defendants Hall and Schrader to illegally terminate Ms. Back for the illegal reasons set forth above.

Legal Claims

I. Violation of Federal Civil Rights (42 U.S.C. §1983)

39. By reason of the actions and conduct set forth above, Ms. Back is entitled, pursuant to 42 U.S.C. §1983, to declaratory and injunctive relief, and compensatory and punitive damages, for the violation of her civil rights resulting from the illegal termination of her employment because of her political affiliation, and in retaliation for her exercise of her First Amendment rights. The actions and conduct of the

defendants set forth above, in terminating Ms. Back's employment, were also implemented in violation of the due process and equal protection clauses of the 14th Amendment to the U.S. Constitution, and in violation of Ms. Back's rights under the 1st Amendment to the U.S. Constitution. Ms. Back is further entitled to her attorneys fees and costs incurred in this action to recover for the violation of her civil rights pursuant to 42 U.S.C. §1988.

II. Violation of State Law (KRS 18A.140 and Ky. Constitution)

40. The actions and conduct of the defendants set forth above constitute a violation of KRS 18A.140, and a denial of free speech, freedom of association, due process and equal protection of the law guaranteed to Ms. Back under Sections 1, 2 and 3 of the Kentucky Constitution, and accordingly, Ms. Back is entitled to declaratory and injunctive relief, and compensatory and punitive damages, pursuant to KRS 446.070 and other applicable state law, for these violations of her state statutory and constitutional rights.

Request for Relief

For the reasons stated above, the plaintiff requests the following relief:

A. A trial by jury.

B. Compensatory damages of $500,000 or such other amount as the jury may determine for each violation of state and federal law set forth above, against the defendants jointly and severally.

C. Punitive damages in the amount of $1,000,000.00 or such other amount as the jury may determine for each violation of state and federal law set forth above, against the defendants jointly and severally.

D. A declaration of rights, holding that the discharge of Ms. Back from her employment was executed in violation of her rights under the 1st and 14th Amendments to the U.S. Constitution, KRS 18A.140, and Sections 1, 2 and 3 of the Kentucky Constitution.

E. Preliminary and Permanent Injunctive Relief, directing the defendants to re-employ the plaintiff with back pay and benefits into a position with Kentucky state government in the classified service, with status under KRS Chapter 18A, at an equivalent pay and grade to the position from which she was illegally terminated.

F. Attorneys fees and costs under 42 U.S.C. §1988.

G. Any other relief to which the plaintiff may become entitled.

Respectfully submitted,

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42 USC 1983

NB: This unofficial compilation of the U.S. Code is current as of Jan. 2, 2006 (see http://www.law.cornell.edu/uscode/uscprint.html).

TITLE 42 – THE PUBLIC HEALTH AND WELFARE
CHAPTER 21 – CIVIL RIGHTS
SUBCHAPTER I – GENERALLY

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. § 1979; Pub. L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284; Pub. L. 104-317, title III, § 309(c), Oct. 19, 1996, 110 Stat. 3853.)

Codification

R.S. § 1979 derived from act Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13.

Section was formerly classified to section 43 of Title 8, Aliens and Nationality.

Amendments

1996-Pub. L. 104-317 inserted before period at end of first sentence, "except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable".

1979-Pub. L. 96-170 inserted "or the District of Columbia" after "Territory", and provisions relating to Acts of Congress applicable solely to the District of Columbia.

Effective Date of 1979 Amendment

Amendment by Pub. L. 96-170 applicable with respect to any deprivation of rights, privileges, or immunities secured by the Constitution and laws occurring after Dec. 29, 1979, see section 3 of Pub. L. 96-170, set out as a note under section 1343 of Title 28, Judiciary and Judicial Procedure.

18A.115 Employment exempted from classified service – Reversion rights of career employees promoted outside classified service – Transfer of employees to Kentucky Community and Technical College System – Change of personnel system for employees of Department for Technical Education and Department for Adult Education and Literacy.

(1) The classified service to which KRS 18A.005 to 18A.200 shall apply shall comprise all positions in the state service now existing or hereafter established, except the following:

(a) The General Assembly and employees of the General Assembly, including the employees of the Legislative Research Commission;

(b) Officers elected by popular vote and persons appointed to fill vacancies in elective offices;

(c) Members of boards and commissions;

(d) Officers and employees on the staff of the Governor, the Lieutenant Governor, the Office of the Secretary of the Governor's Cabinet, and the Office of Program Administration;

(e) Cabinet secretaries, commissioners, office heads, and the administrative heads of all boards and commissions, including the executive director of Kentucky Educational Television and the executive director and deputy executive director of

the Education Professional Standards Board;

(f) Employees of Kentucky Educational Television who have been determined to be exempt from classified service by the Kentucky Authority for Educational Television, which shall have sole authority over such exempt employees for employment, dismissal, and setting of compensation, up to the maximum established for the executive director and his principal assistants;

(g) One (1) principal assistant or deputy for each person exempted under subsection (1)(e) of this section;

(h) One (1) additional principal assistant or deputy as may be necessary for making and carrying out policy for each person exempted under subsection (1)(e) of this section in those instances in which the nature of the functions, size, or complexity of the unit involved are such that the commissioner approves such an addition on petition of the relevant cabinet secretary or department head and such other principal assistants, deputies, or other major assistants as may be necessary for making and carrying out policy for each person exempted under subsection (1)(e) of this section in those instances in which the nature of the functions, size, or complexity of the unit involved are such that the board may approve such

an addition or additions on petition of the department head approved by the commissioner;

(i) Division directors subject to the provisions of KRS 18A.170. Division directors in the classified service as of January 1, 1980, shall remain in the classified service;

(j) Physicians employed as such;

(k) One (1) private secretary for each person exempted under subsection (1)(e), (g), and (h) of this section;

(l) The judicial department, referees, receivers, jurors, and notaries public;

(m) Officers and members of the staffs of state universities and colleges and student employees of such institutions; officers and employees of the Teachers' Retirement System; and officers, teachers, and employees of local boards of education;

(n) Patients or inmates employed in state institutions;

(o) Persons employed in a professional or scientific capacity to make or conduct a temporary or special inquiry, investigation, or examination on behalf of the General Assembly, or a committee thereof, or by authority of the Governor, and persons employed by state agencies for a specified, limited period to provide

professional, technical, scientific, or artistic services under the provisions of KRS 45A.690 to 45A.725;

(p) Interim employees;

(q) Officers and members of the state militia;

(r) Department of Kentucky State Police troopers;

(s) University or college engineering students or other students employed part-time or part-year by the state through special personnel recruitment programs; provided that while so employed such aides shall be under contract to work full-time for the state after graduation for a period of time approved by the commissioner or shall be participants in a cooperative education program approved by the commissioner;

(t) Superintendents of state mental institutions, including heads of mental retardation centers, and penal and correctional institutions as referred to in KRS 196.180(2);

(u) Staff members of the Kentucky Historical Society, if they are hired in accordance with KRS 171.311;

(v) County and Commonwealth's attorneys and their respective appointees;

(w) Chief district engineers and the state highway engineer;

(x) Veterinarians employed as such by the Kentucky Horse Racing Authority;

(y) Employees of the Kentucky Peace Corps;

(z) Employees of the Council on Postsecondary Education;

(aa) Executive director of the Commonwealth Office of Technology;

(ab) Employees of the Kentucky Commission on Community Volunteerism and Service;

(ac) Persons employed in certified teaching positions at the Kentucky School for the Blind and the Kentucky School for the Deaf; and

(ad) Federally funded time-limited employees as defined in KRS 18A.005.

(2) Nothing in KRS 18A.005 to 18A.200 is intended, or shall be construed, to alter or amend the provisions of KRS 150.022 and 150.061.

(3) Nothing in KRS 18A.005 to 18A.200 is intended or shall be construed to affect any nonmanagement, nonpolicy-making position which must be included in the classified service as a prerequisite to the grant of federal funds to a state agency.

(4) Career employees within the classified service promoted to positions exempted from classified service shall, upon termination of their employment in the exempted service, revert to a position in that class in the agency from which

they were terminated if a vacancy in that class exists. If no such vacancy exists, they shall be considered for employment in any vacant position for which they were qualified pursuant to KRS 18A.130 and 18A.135.

(5) Nothing in KRS 18A.005 to 18A.200 shall be construed as precluding appointing officers from filling unclassified positions in the manner in which positions in the classified service are filled except as otherwise provided in KRS 18A.005 to 18A.200.

(6) The positions of employees who are transferred, effective July 1, 1998, from the Cabinet for Workforce Development to the Kentucky Community and Technical College System shall be abolished and the employees' names removed from the roster of state employees. Employees that are transferred, effective July 1, 1998, to the Kentucky Community and Technical College System under KRS Chapter 164 shall have the same benefits and rights as they had under KRS Chapter 18A and have under KRS 164.5805; however, they shall have no guaranteed reemployment rights in the KRS Chapter 151B or KRS Chapter 18A personnel systems. An employee who seeks reemployment in a state position under KRS Chapter 151B or KRS Chapter 18A shall have years of service in the Kentucky Community and Technical College System counted towards years of experience for calculating benefits and compensation.

(7) On August 15, 2000, all certified and equivalent personnel, all unclassified personnel, and all certified and equivalent and unclassified vacant positions in the Department for Adult Education and Literacy shall be transferred from the personnel system under KRS Chapter 151B to the personnel system under KRS Chapter 18A. The positions shall be deleted from the KRS Chapter 151B personnel system. All records shall be transferred including accumulated annual leave, sick leave, compensatory time, and service credit for each affected employee. The personnel officers who administer the personnel systems under KRS Chapter 151B and KRS Chapter 18A shall exercise the necessary administrative procedures to effect the change in personnel authority. No certified or equivalent employee in the Department for Adult Education and Literacy shall suffer any penalty in the transfer.

(8) On August 15, 2000, secretaries and assistants attached to policymaking positions in the Department for Technical Education and the Department for Adult Education and Literacy shall be transferred from the personnel system under KRS Chapter 151B to the personnel system under KRS Chapter 18A. The positions shall be deleted from the KRS Chapter 151B system. All records shall be transferred including accumulated annual leave, sick leave, compensatory time, and service credit for each affected employee. No employee shall suffer any penalty in the transfer.

Effective: June 26, 2007

History: Amended 2007 Ky. Acts ch. 85, sec. 105, effective June 26, 2007. – Amended 2006 Ky. Acts ch. 208, sec. 1, effective July 12, 2006. – Amended 2005 Ky. Acts ch. 85, sec. 43, effective June 20, 2005. – Amended 2004 Ky. Acts ch. 127, sec. 3, effective July 13, 2004; and ch. 191, sec. 51, effective July 13, 2004. – Amended 2001 Ky. Acts ch. 137, sec. 4, effective June 21, 2001. – Amended 2000 Ky. Acts ch. 203, sec. 6, effective July 14, 2000; and ch. 526, sec. 16, effective July 14, 2000. – Amended 1998 Ky. Acts ch. 540, sec. 4, effective July 15, 1998; and ch. 353, sec. 7, effective July 15, 1998. – Amended 1997 (1st Extra. Sess.) Ky. Acts ch. 1, sec. 31, effective May 30, 1997. – Amended 1992 Ky. Acts ch. 100, sec. 11, effective July 14, 1992. – Amended 1990 Ky. Acts ch 159, sec. 1, effective March 30, 1990; and ch. 496, sec. 25, effective July 13, 1990. – Amended 1986 Ky. Acts ch. 494, sec. 18, effective July 15, 1986. – Amended 1984 Ky. Acts ch. 253, sec. 1, effective July 13, 1984; and ch. 350, sec. 10, effective July 13, 1984. – Repealed, reenacted, and amended as KRS 18A.115, 1982 Ky. Acts ch. 448, sec. 23, effective July 15, 1982. – Amended 1980 Ky. Acts ch. 98, sec. 3, effective July 15, 1980; and ch. 132, sec. 2, effective July 15, 1980. – Amended 1978 Ky. Acts ch. 155, sec. 18, effective June 17, 1978; and ch. 391, sec. 1, effective

June 17, 1978. – Amended 1976 (1st Extra. Sess.) Ky. Acts ch. 17, sec. 18, effective January 1, 1978. – Amended 1974 Ky. Acts ch. 74, Art. VI, sec. 32; ch. 162, sec. 3; and ch. 308, sec. 7. – Amended 1972 Ky. Acts ch. 13, sec. 2. – Amended 1970 Ky. Acts ch. 278, sec. 1. – Created 1960 Ky. Acts ch. 63, sec. 4.

Formerly codified as KRS 18.140.

2006-2008 Budget Reference. See State/Executive Branch Budget, 2006 Ky. Acts ch. 252, Pt. I, D.1.(1), at 1167; and State/Executive Branch Budget Memorandum, 2006 Ky. Acts ch. 257, at 2427 (Final Budget Memorandum, at 764).

18A.140 Prohibition against discrimination and political activities.

(1) No person shall be appointed or promoted to, or demoted or dismissed from, any position in the classified service, or in any way favored or discriminated against with respect to employment in the classified services because of his political or religious opinions or affiliations or ethnic origin or sex or disability. No person over the age of forty (40) shall be discriminated against because of age.

(2) No person shall use or promise to use, directly or indirectly, any official authority or influence, whether possessed or anticipated, to secure or

attempt to secure for any person an appointment or advantage in appointment to a position in the classified service, or an increase in pay or other advantage in employment in any such position, for the purpose of influencing the vote or political action of any person.

(3) No employee in the classified service or member of the board or its executive director or secretary shall, directly or indirectly, pay or promise to pay any assessment for political purposes, or solicit or take any part in soliciting for any political party, or solicit or take any part in soliciting any political assessment, subscription, contribution, or service. No person shall solicit any political assessment, subscription, contribution, or service of any employee in the classified service.

(4) No employee in the classified service or member of the board or its executive director shall be a member of any national, state, or local committee of a political party, or an officer or member of a committee of a partisan political club, or a candidate for nomination or election to any paid public office, or shall take part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote. Officers or employees of the classified service may be candidates for and occupy a town or school district office if the office is one for which no compensation, other than a per diem payment, is provided and the election is on a nonpartisan basis.

Effective: July 15, 1998

History: Amended 1998 Ky. Acts ch. 154, sec. 35, effective July 15, 1998. – Amended 1994 Ky. Acts ch. 405, sec. 6, effective July 15, 1994. – Amended 1986 Ky. Acts ch. 494, sec. 19, effective July 15, 1986. – Repealed, reenacted, and amended as KRS 18A.140, 1982 Ky. Acts ch. 448, sec. 28, effective July 15, 1982. – Amended 1980 Ky. Acts ch. 132, sec. 5, effective July 15, 1980. – Amended 1978 Ky. Acts ch. 269, sec. 7, effective June 17, 1978. – Amended 1976 Ky. Acts ch. 86, sec. 10, effective March 29, 1976; and ch. 331, sec. 1, effective June 19, 1976. – Created 1960 Ky. Acts ch. 63, sec. 19.

Formerly codified as KRS 18.310.

Legislative Research Note. Although this section is included in Acts 1986, ch. 494, sec. 19, the change in this section was deleted by conference committee amendment.

Supreme Court, U.S.
FILED
DEC 3 - 2008
OFFICE OF THE CLERK

No. 08-435

IN THE

Supreme Court of the United States

KEITH A. HALL,

Petitioner,

v.

LINDA WELLS BACK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit properly applied this Court's decision in *Crawford-El v. Britton*, 523 U.S. 574 (1998), in concluding (a) that Respondent adequately alleged a political affiliation dismissal in violation of the First and Fourteenth Amendments and (b) that Petitioner is not entitled to qualified immunity.

2. Whether the Sixth Circuit properly applied this Court's decision in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), in concluding that Respondent adequately alleged a political affiliation dismissal in violation of the First and Fourteenth Amendments.

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Ian Urbina, Kentucky Governor Signs Agreement Citing Wrongdoing in a Hiring Scandal, N.Y. Times (Aug. 25, 2006) *available at http://www.nytimes.com/2006/08/25/us/* 1

5 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 1202 (3d ed. 2004) 15

PRELIMINARY STATEMENT

The firing of Respondent Linda Wells Back ("Back") from her civil-service position of Internal Policy Analyst III with the Kentucky Office of Homeland Security ("OHS"), a state administrative agency, by respondent Keith Hall ("Hall"), erstwhile Executive Director of the OHS, forms the basis for this action. Against a backdrop of public acknowledgment of scandal in the administration of former Kentucky Governor Ernie Fletcher -- "the evidence strongly indicates wrongdoing by his administration with regard to personnel actions within the merit system,"[1] Back's section 1983 complaint alleges that Hall fired her because of her political affiliation as a Democrat in violation of the First Amendment and the Fourteenth Amendment. The twofold issue is whether Back's complaint sufficiently alleges a political affiliation dismissal and whether Hall, in such a situation, is entitled to qualified immunity.

In December 2003, the Kentucky governor's office changed from a Democratic administration to a Republican one. Hall, a Republican, was appointed as the Executive Director of the OHS in November 2004. Approximately two months later, on January 19, 2005, Back was fired. Back filed her complaint on January 17, 2006. Hall moved to dismiss her complaint, and the district court granted the motion

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[1] Ian Urbina, *Kentucky Governor Signs Agreement Citing Wrongdoing in a Hiring Scandal*, N.Y. Times (Aug. 25, 2006), *available at http://www.nytimes.com/2006/08/25/us/25kentucky.html*.

in part and denied it in part, so that Back's section 1983 claim of political affiliation dismissal against Hall in his individual capacity survived. Hall also filed a motion for qualified immunity, which the district court denied. On interlocutory appeal, the Sixth Circuit affirmed that denial, concluding that Back raised sufficient political affiliation allegations and Hall was not entitled to qualified immunity.

The petition for writ of certiorari should be denied in its entirety. The Sixth Circuit's opinion is entirely faithful to this Court's decision in *Crawford-El v. Britton*, 523 U.S. 574 (1998). In *Crawford-El*, this Court refused to impose a heightened pleading requirement. Hall's dissatisfaction with that refusal does not constitute a reason to grant certiorari.

Moreover, the Sixth Circuit's opinion does not conflict with this Court's decision in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), which held that a complaint must "state a claim to relief that is plausible on its face," *id.* at 1974; *see also Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007).

Most importantly, this case is a poor vehicle for certiorari review because Back adequately pled her political affiliation dismissal claim under either a heightened pleading standard or a notice pleading standard. Further, the decision below neither conflicts with prior precedents of this Court nor presents a matter of pressing public importance requiring this Court's intervention. Accordingly, certiorari should be denied.

STATEMENT

A. Background

On February 16, 2003, Back worked for the OHS as a grants and contracts administrator, a classified (or merit system) position protected under Ky. Rev. Stat. Ann. Ch. 18A, the Kentucky civil service statute. (Pet. App. 18; Compl. ¶ 10). Back successfully completed her probationary period, receiving excellent evaluations from her supervisor. (*Id.* ¶ 11). During the transitional time following the 2003 gubernatorial election, with the exit of the Democratic administration and the entrance of the Republican one, Back was the only merit system employee who remained; all other OHS employees were non-merit appointees and resigned upon the change in gubernatorial administration. (*Id.* ¶¶ 12, 14).

In March 2004, Erwin Roberts, an appointee of Governor Ernie Fletcher, replaced Back's supervisor, Col. Ray A. Nelson, as Executive Director of OHS. (*Id.* ¶ 13). On May 24, 2004, OHS became the state administrative agency responsible for meting out Homeland Security federal grants under an executive order of Governor Fletcher. (Pet. App. 19; Compl. ¶ 16). Back's responsibilities included processing federal grant applications and funding for the office as well as other administrative duties. (*Id.* ¶ 17). As the Republican administration hired new personnel, Back trained them. (*Id.* ¶ 19).

During the spring of 2004, Executive Director Roberts asked Back to set up the competitive grant application process. (Pet. App. 20; Compl. ¶ 22). As

requested, Back recommended a list of qualified persons to serve on the committee to review grant applications for federal Homeland Security grants to local governments. (*Id.*) However, Joel Schrader, the deputy director of OHS under the Republican administration, demanded the removal of persons on the list based on their political affiliation as Democrats. (*Id.*). Back served as staff to the review committee, which evaluated approximately 224 grant applications and made recommendations without regard to political affiliation based on objective scoring criteria that were publicly shared with all applicants at the beginning of the application process. (*Id.* ¶ 23). Officials in the Office of the Governor rejected a number of the grants recommended by the review committee based on partisan grounds, and awarded grants to proposals with lower scores over higher scoring proposals based on the political affiliation of the applicants. (Pet. App. 21; Compl. ¶ 24). In response, Back voiced her concerns about the use of political affiliation in the awarding of federal Homeland Security grants. (Pet. App. 22; Compl. ¶ 26).

During the summer of 2004, Executive Director Roberts asked Back to help develop questionnaires and rating sheets to evaluate potential employees based on their knowledge and experience in the area of federal grant administration. (*Id.*; Compl. ¶ 27). During that same summer, prospective employees were asked about their political affiliation, (*id.* ¶ 28), and when Back voiced her concern about this, she was largely excluded from the interviewing process. (*Id.*).

Executive Director Roberts spoke to Back about upgrading her position during the spring and summer of 2004 to reflect her expanded responsibilities. (*Id.* ¶ 29). Back expressed concern about accepting a non-merit position. (*Id.*). Roberts suggested a civil service position as a branch manager but then changed his mind because the position required direct involvement with Schrader, who repeatedly invoked political considerations in the process of awarding grants and hiring personnel. (Pet. App. 28; Compl. ¶ 30). "Trust me," Roberts told Back. "You don't want it." (*Id.*). Roberts appointed Back to the position of Internal Policy Analyst III, effective September 1, 2004, also a classified position under Ky. Rev. Stat. Ann. Ch. 18A. (*Id.* ¶ 31).

In October of 2004, Roberts resigned, and in November 2004, Hall, a former lobbyist, became Executive Director of OHS. (*Id.* ¶¶ 32-33). On Wednesday, January 19, 2005, Hall and Schrader called Back into a 4 p.m. meeting, advised her that she was being terminated, and told her to clean out her desk and return her identification badge and parking pass. (Pet. App. 24; Compl. ¶ 36).

B. Decisions Below

On January 17, 2006, Back filed this lawsuit in the Eastern District of Kentucky against Hall, Schrader, Alecia Webb-Edgington (Kentucky's Director of Homeland Security), and the Commonwealth of Kentucky. (Pet. App. 15, Compl. ¶ 1). Back alleged that Hall violated her First Amendment and state-law rights by firing her because of her political affiliation as a Democrat and in retaliation for her

complaints about Schrader's use of "partisan political considerations." (Pet. App. 25, Compl. ¶ 37). Since this Court's decision in *Elrod v. Burns*, 427 U.S. 347 (1976), patronage dismissals have been recognized as unconstitutional under the First and Fourteenth Amendments because they "severely restrict political belief and association." *Id.* at 372-73; *see also Caudill v. Hollan*, 431 F.3d 900, 908 (6th Cir. 2005). To state a claim, a plaintiff needs to allege that she was discharged because of her political affiliation. *Branti v. Finkel*, 445 U.S. 507, 517 (1980). This Court articulated an exception for those policymaking or advisory positions where the governmental authority can demonstrate that "party affiliation is an appropriate requirement for the effective performance of the office involved." *Id.* at 518; *see also Goodman v. Pennsylvania Tpk. Comm'n*, 293 F.3d 655, 663 (3d Cir. 2002).

The district court dismissed Back's suit against the Commonwealth, Webb-Edgington, and Hall and Schrader in their official capacities based upon sovereign immunity. *Back v. Hall*, No. 06-05, 2006 WL 2844144, at *1-2 (E.D. Ky. Sept. 29, 2006). The court dismissed Back's state-law claims due to her failure to exhaust her administrative remedies. *Id.* at *3. However, the district court held that Hall and Schrader were not entitled to qualified immunity and that Back's section 1983 First Amendment claims could proceed against them in their individual capacities. *Id.* at *2-3.

Hall filed a motion to reconsider his entitlement to qualified immunity, and Schrader filed a motion

for judgment on the pleadings based on *Garcetti v. Ceballos*, 547 U.S. 410 (2006), after the judge who was initially assigned the case recused herself. *Back v. Hall*, 537 F.3d 552, 555 (6th Cir. 2008). The district court, relying on *Garcetti*, dismissed Back's freedom-of-speech claims, holding her speech unprotected as a matter of law because all of her statements were made pursuant to the duties of her position at OHS. *Back v. Hall*, No. 3:06-5-JMH, 2007 WL 1974187, at *2 (E.D. Ky. July 3, 2007). However, the district court denied Hall and Schrader's requests for qualified immunity on Back's patronage dismissal claims. *Id.* at *3-4.

The court began by stating that "[i]t is unconstitutional for a public employer to make personnel decisions based on political beliefs, unless 'the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.'" *Id.* at *3 (quoting *Branti v. Finkel*, 445 U.S. 507, 519 (1980)). The court noted that this *Branti* exception to the First Amendment protection against patronage dismissals "presumptively . . . encompass[es] positions placed by the legislature outside of the 'merit' civil service." *Id.* (quoting *McCloud v. Testa*, 97 F.3d 1536, 1542 (6th Cir. 1996)). Rejecting Hall's argument that although Back's Internal Policy Analyst position was a non-political merit position, her civil service protection was not intact because she was still in a probationary period, the court decided that Kentucky law does not allow employees -- even probationary merit system employees -- to be subjected to political affiliation discrimination. *Id.* at *4. Moreover, the court

reasoned, the *Rice* canon provides for deference to the judgment of a state legislature's determination of the essential nature of a job, and since the state legislature classified Back's positions as merit system positions, it clearly considered them non-political. *Id.*; *see also Rice v. Ohio Dep't of Transp.*, 14 F.3d 1133, 1143 (6th Cir. 1994)). The district court concluded that Hall was not entitled to qualified immunity because Back had adequately alleged that her constitutional right was violated when she was terminated because she was a Democrat; that the violation involved her clearly established constitutional right to freedom of association; and that she had offered sufficient evidence to indicate that what Hall allegedly did was objectively unreasonable in light of her clearly established constitutional right. *Back*, 2007 WL 1974187, at *4.

Hall and Schrader sought interlocutory review in the court of appeals of the district court's political affiliation decision, which rejected their qualified immunity defense, but the Sixth Circuit affirmed. *Back v. Hall*, 537 F.3d 552, 554 (6th Cir. 2008). It set out the standard of review by stating that "[j]ust as we gauge other pleading-stage dismissals to determine only whether the complaint states a claim upon which relief can be granted, *see* Fed. R. Civ. P. 12(b)(6), so we review an assertion of qualified immunity to determine only whether the complaint adequately alleges the commission of acts that violated clearly established law." *Id.* at 555-56 (citation and internal quotation marks omitted). The court recited the Federal Rules of Civil Procedure's requirement that pleadings must set forth "a short and

plain statement showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a), and noted that "nothing about the defense of qualified immunity alters this modest pleading requirement." *Back*, 537 F.3d at 556 (citing *Goad v. Mitchell*, 297 F.3d 497, 503 (6th Cir. 2002)).

The Sixth Circuit held that, "[m]easured by this yardstick, Back's political affiliation allegations suffice, and neither Hall nor Schrader is entitled to qualified immunity at this early stage of the case." *Id.* Under *Saucier*, the court evaluated whether "any constitutional right was violated and whether that right was clearly established." *Id.* (citing *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001)). It found that Back's allegations that she was a civil-service employee and that she was fired because of her political affiliation as a Democrat adequately pled a clearly established constitutional violation. *Id.*

After briefly discussing the *Branti* exception to the First Amendment right of "current and aspiring public employees" to be free from hiring and firing practices based on political affiliation, the court examined whether Back's former position was entitled to First Amendment protection because it involved no exercise of "discretion of political significance." *Id.* at 556-57 (citing *McCloud*, 97 F.3d at 1559). It concluded that Back's position fell "within the category of offices for which political affiliation is irrelevant." *Id.* at 556. The court reasoned that Kentucky's civil-service statute made Back's position classified, and Hall and Schrader had given it no reason to second guess the state legislature's deter-

mination that her position should be treated as non-political. *Id.* (citing *Rice*, 14 F.3d at 1143).

Secondly, the court determined that as of the date of Back's termination, Sixth Circuit precedent had established that administrative employees like Back who perform tasks that involve no discretion of political significance are entitled to First Amendment protection. *Id.* at 557. It rejected the attempts of Hall and Schrader to require that a published decision exist holding that political compatibility is not an appropriate requirement for her position, noting that prior precedent established that no separate patronage dismissal decision need exist "involving a particular position before qualified immunity can be denied." *Id.* (quoting *McCloud*, 97 F.3d at 1556). The probationary status argument did not succeed before the Sixth Circuit either: it held, "[i]t may well be that a probationary employee, like an at-will employee, may be fired for no reason or most any reason; she just cannot be fired for an unconstitutional reason." *Id.* at 558 (citation and internal quotation marks omitted).

Finally, Hall and Schrader argued that Back failed to establish a prima facie case of political affiliation dismissal. Rejecting their argument, the Sixth Circuit stated that "[b]ecause we are at the pleading stage of this case, and because there is no 'heightened pleading requirement . . . for civil rights plaintiffs in cases in which the defendant raises the affirmative defense of qualified immunity,' *Goad*, 297 F.3d at 503; *see also Crawford-El v. Britton*, 523 U.S. 574 (1998), Back was not required to plead her prima

facie case, *cf. Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002)." *Back*, 537 F.3d at 558. Rather, "[i]t sufficed to allege that she was fired because of her political affiliation in violation of the First Amendment." *Id.*

To Hall's and Schrader's protestations that Back's allegations were conclusory, deserving dismissal, the Sixth Circuit replied, "as the Supreme Court has recently made clear, the conclusory nature of particular allegations cannot alone justify dismissing a complaint. *See Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007). . . . [F]or now, at the pleading stage, it suffices that Back alleged that she was terminated by defendants Hall and Schrader by reason of her political affiliation as a Democrat." *Back*, 537 F.3d at 558 (internal quotation marks omitted). Hall's petition for writ of certiorari followed.

REASONS FOR DENYING THE PETITION

The decision below presents no occasion for certiorari review. First, Hall asserts that confusion exists with respect to the standard courts should apply to specificity of pleading when a qualified immunity defense is asserted. He contends that no applicable standard exists because in *Crawford-El v. Britton*, 523 U.S. 574 (1998), the Court held there is no "heightened pleading standard" but did not reach what test actually applies when a qualified immunity defense is raised "because instructing the District Courts to firmly apply the Federal Rules of Civil Procedure is no test at all." (Pet. 11). He asserts that some tension exists between the Supreme Court's articulation in *Bell Atlantic Corp. v. Twombly*, 127 S.

Ct. 1955, 1974 (2007), that a complaint must be sufficient "to state a claim to relief that is plausible on its face," and the notice pleading requirement contained in Fed. R. Civ. P. 8(a)(2) that a complaint need only give "a short and plain statement of the claim showing that the pleader is entitled to relief." (Pet. 12). He argues that the rejection of the heightened pleading standard in *Crawford-El* and the "order of battle" rule in *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001),[1] complicate matters further, leaving district courts adrift as to what standard applies in section 1983 claims where a qualified immunity defense is asserted. (Pet. 17). While Hall's rhetoric is colorful, certiorari is not warranted. Hall's personal view that "[q]ualified immunity has been emasculated by *Crawford-El*," (Pet. 26), and his repudiation of this Court's precedents, which have been readily accepted and applied by the courts of appeals, are not grounds for certiorari review.

Even if the pleading standard were unsettled, this case remains a poor vehicle for certiorari review because Back has adequately pled her section 1983 political affiliation claim under either a notice pleading

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[1] The "order of battle" rule requires courts considering whether a government official is entitled to qualified immunity to determine (1) whether the facts alleged, taken in the light most favorable to the nonmovant, demonstrate the violation of a constitutional right, and (2) if so, then it must be determined whether the contours of the right were clearly established such that a reasonable person would understand that his actions violated that right. *Saucier*, 533 U.S. at 200-02.

standard or a heightened pleading standard. Although Hall portrays Back's complaint as conclusory and lacking substance, this is simply not so. Moreover, the decision below neither conflicts with any prior decision of this Court nor involves any matter of pressing public importance requiring this Court's intervention. Accordingly, the Court should deny certiorari.

A. This Court's Precedents Make Clear that No Heightened Pleading Standard Is Required in Section 1983 Cases Involving the Assertion of a Qualified Immunity Defense.

In an effort to revive his qualified immunity defense, Hall attacks Back's complaint as well as settled precedents governing the relevant pleading standard and qualified immunity analysis. He describes the law in this area as confused, "emasculated," and filled with tension. (Pet. 16-17, 26). As noted, both lower courts resolved the qualified immunity question in Back's favor with little difficulty. This result is manifestly correct, and there is no warrant for further review by this Court.

1. *Twombly:* Rejection of a "Gloss" on an Accepted Standard

Rule 8(a)(2) of the Federal Rules of Civil Procedure sets out the familiar and forgiving standard of notice pleading: "A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Traditionally, district courts were not to dismiss a complaint "for failure to state a claim

unless it appear[ed] beyond doubt that the plaintiff c[ould] prove *no set of facts* in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (emphasis supplied). In *Bell Atlantic Corporation v. Twombly*, 127 S. Ct. 1955 (2007), this Court discussed the *Conley* "no set of facts" gloss in some detail. Noting that too literal a reading of the "no set of facts" gloss might prevent a court from dismissing even a "wholly conclusory statement of claim" where the pleadings left open even a "possibility" that a plaintiff might later establish some "set of facts," this Court recounted the disinclination of a "good many judges and commentators" to take the phrase literally. *Id.* at 1968-69 (citing cases and articles). In *Twombly*, this Court "retire[d]" the *Conley* "no set of facts" phrase, describing it as "best forgotten as an incomplete, negative gloss on an *accepted pleading standard*: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Id.* at 1969 (emphasis supplied). Abandonment of the gloss did not mean abandonment of the settled and accepted notice pleading standard.

This Court broke no new ground describing the standard, beginning by reciting the familiar Rule 8(a)(2) language. It continued,

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclu-

> sions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact). . . .

Id. at 1964-65 (citations omitted).

In the context of section 1 of the Sherman Act, this Court held that

> stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and "that a recovery is very remote and unlikely."

Id. at 1965 (footnotes omitted) (quoting 5 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 1202 (3d ed. 2004)). This Court noted that Rule 8(a)(2)'s notice pleading requirement *did* eliminate the requirement that a claimant "set out *in detail* the facts upon which he bases his claim," but that the Rule "still requires a 'showing,' rather than a blanket assertion, of entitlement to relief." *Id.* at 1965 n.3 (citations omitted). However, this Court emphasized that it was *not* requiring a "heightened fact pleading

of specifics"; rather, a complaint need only contain "enough facts to state a claim to relief that is *plausible* on its face" rather than merely "conceivable." *Id.* at 1974. Applying this standard to the case before it, this Court held that "[b]ecause the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." *Id.*

A few weeks later, this Court decided *Erickson v. Pardus*, 127 S. Ct. 2197 (2007), demonstrating that no change in the standard had taken place. In *Erickson*, the Court vacated the Tenth Circuit's judgment affirming the district court's dismissal of a prisoner's section 1983 suit against prison medical officials, which alleged deliberate indifference to his serious medical needs based on prison officials' removing him from a treatment program for his liver condition resulting from hepatitis C. *Id.* at 2198. Rejecting the Tenth Circuit's conclusion that the allegations in question warranted dismissal because they were too conclusory, this Court emphasized that Rule 8(a)(2) of the Federal Rules of Civil Procedure requires only notice pleading -- "a short and plain statement of the claim showing that the pleader is entitled to relief." 127 S. Ct. at 2200. Citing *Twombly*, the Court continued, "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the claim is and the grounds upon which it rests.'" *Id.* (citing *Twombly*, 127 S. Ct. at 1955). In addition, the Court emphasized, "when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." *Id.*

The Supreme Court has thus made abundantly clear that *Twombly* continues to embrace the notice pleading standard. What *Twombly* rejected was the *Conley* "gloss" on the "accepted" notice pleading standard; it rejected the notion that no complaint should be dismissed "unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief." 127 S. Ct. at 1969-70. In other words, a court should not struggle to dream up some *conceivable* set of facts which would animate an otherwise insufficient complaint. Instead, the complaint should do its own work. It should give notice to a defendant of plaintiff's claim. It need not provide detailed allegations and inferences may be drawn, but it should not require the reader to work hard at imagining a set of facts that would entitle plaintiff to relief. This is not at all the same as requiring a heightened pleading standard, mandating a plaintiff to set out in detail the facts undergirding his cause of action. *See, e.g., Aktieselskabet Af 21. Nov. 2001 v. Fame Jeans, Inc.*, 525 F.3d 8, 15 (D.C. Cir. 2008) ("We conclude that *Twombly* leaves the long-standing fundamentals of notice pleading intact."); *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1103-04 (9th Cir. 2008); *Phillips v. County of Allegheny*, 515 F.3d 224, 233, 235 (3d Cir. 2008) ("under our reading, the notice pleading standard of Rule 8(a)(2) remains intact"); *Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 841-42 (9th Cir. 2007); *Watts v. Florida Int'l Univ.*, 495 F.3d 1289, 1295-96 (11th Cir. 2007). No wholesale rejection of a settled standard is in play here.

2. *Crawford-El*: Rejection of a Heightened Pleading Standard

The presence of a qualified immunity defense changes nothing. Other precedents of this Court have indisputably rejected a heightened pleading standard in section 1983 and other contexts. *See, e.g., Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002) (holding that a plaintiff's complaint in a Title VII case need not contain specific facts sufficient to establish a prima facie case under *McDonnell Douglas*); *Crawford-El v. Britton*, 523 U.S. 574 (1998) (holding that a prisoner bringing a section 1983 action against a government official need not present clear and convincing evidence of the official's improper motive in order to defeat the official's motion for summary judgment); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993) (rejecting a heightened pleading requirement for section 1983 claims alleging municipal liability). Although Hall vigorously attacks *Crawford-El*, circuits across the land have followed this precedent for a decade with little fanfare. Hall's personal preference for the dissenting view rather than the majority's view in *Crawford-El* does not constitute grounds for certiorari.

What was true a decade ago in *Crawford-El* remains true now: "[n]either the text of § 1983 or any other federal statute, nor the Federal Rules of Civil Procedure, provide any support for imposing" a heightened pleading standard on a plaintiff. 523 U.S. at 594. Then, as now, existing procedures established by the Federal Rules of Civil Procedure

remain available to federal district judges handling such claims. *Crawford-El*, 523 U.S. at 598. Qualified immunity defense or not, it is "impossible to square the 'heightened pleading standard' . . . with the liberal system of 'notice pleading' set up by the Federal Rules." *Leatherman*, 507 U.S. at 168. Rule 9(b) does address the need for greater particularity in pleading certain claims, but section 1983 is not among them. *Id.* As this Court reasoned in *Leatherman*, *expressio unius est exclusion alterius*: the mention of one thing is the exclusion of another. *Id.*; *see also Swierkiewicz*, 534 U.S. at 513 ("Just as Rule 9(b) makes no mention of municipal liability under [section 1983], neither does it refer to employment discrimination. Thus, complaints in these cases, as in most others, must satisfy only the simple requirements of Rule 8(a)."). The presence of a qualified immunity defense in a case provides no grounds for rejecting the accepted notice pleading standard set in place by the Federal Rules of Civil Procedure.[3]

Some lower courts have labored to apply *Twombly* to the qualified immunity context and, in the end, have reached the same conclusion: although this Court rejected the *Conley* gloss on the accepted standard, courts may not apply a heightened pleading standard in the context of a qualified immunity defense. For example, in *Robbins v. Oklahoma*, 519 F.3d 1242 (10th Cir. 2008), the Tenth Circuit described *Twombly* as "announcing a new (or clarified)

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[3] *But see Danley v. Allen*, 540 F.3d 1298, 1313 (11th Cir. 2008).

standard," which it acknowledged was "less than pellucid" and as resting somewhere between "heightened fact pleading, *which is expressly rejected*," and allowing conclusory complaints based on "a formulaic recitation of the elements of a cause of action," which will not do. *Id.* at 1247 (emphasis supplied). The Tenth Circuit was careful to note that *Twombly* "reiterates the bedrock principle that a judge ruling on a motion to dismiss must accept all allegations as true and may not dismiss on the ground that it appears unlikely the allegations can be proven." *Id.* Thus, reasoned the Tenth Circuit, "'plausible' cannot mean 'likely to be true.'" *Id.* In the context of a qualified immunity defense asserted by state officials, the Tenth Circuit held that "plaintiffs must allege facts sufficient to show (assuming they are true) that the defendants plausibly violated their constitutional rights, and that those rights were clearly established at the time. This requires enough allegations to give the defendants notice of the theory under which their claim is made." *Id.* at 1249. Noting that both *Crawford-El* and *Twombly* rejected a heightened pleading standard, the court concluded that complaints in cases subject to qualified immunity defenses need not include "all the factual allegations necessary to sustain a conclusion that defendant violated clearly established law." *Id.* Instead, a complaint must make clear the "grounds" on which plaintiff is entitled to relief, *id.* (quoting *Twombly*, 127 S. Ct. at 1965 n.3), thus satisfying the requirements of notice pleading.

In *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 2931 (June 16, 2008) (Nos.

07-1015, 07-1150, 07-827), the Second Circuit discussed the pleading standard "to overcome a qualified immunity defense," analyzing *Leatherman*, *Swierkiewicz*, and *Crawford-El*, and noted that after *Swierkiewicz*, "[m]ost Circuits appear to have rejected a heightened pleading standard." *Iqbal*, 490 F.3d at 153-55.[4] Turning to *Twombly*, the Second Circuit noted that the decision "explicitly disclaims that it was 'requir[ing] heightened fact pleading of specifics,' and emphasized the continued viability of *Swierkiewicz*, which had rejected a heightened pleading standard." *Id.* at 156. The Second Circuit also pointed out that "just two weeks after issuing its opinion in [*Twombly*], the Court cited it for the traditional proposition that '[s]pecific facts are not necessary [for a pleading that satisfied Rule 8(a)(1)]'; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Id.* at 157 (quoting *Erickson*, 127 S. Ct. at 2200).

The Second Circuit concluded, "[a]fter careful consideration," that "the Court is not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible 'plausibility standard,'

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[4] Some of these pre-*Twombly* cases included *Moya v. Schollenbarger*, 465 F.3d 444, 454-55 (10th Cir. 2006); *Empress LLC v. City and County of San Francisco*, 419 F.3d 1052, 1055-56 (9th Cir. 2005); *Doe v. Cassel*, 403 F.3d 986, 989 (8th Cir. 2005); *Educadores Puertorriquenos en Accion v. Hernandez*, 367 F.3d 61, 66-67 (1st Cir. 2004); *Goad v. Mitchell*, 297 F.3d 497, 502-03 (6th Cir. 2002).

which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*." *Id.* at 157-58. Despite the fact that *Swierkiewicz* was a Title VII decision, the Second Circuit remained "mindful of the Supreme Court's statement in that decision that heightened pleading requirements 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'" *Id.* at 158 (quoting *Swierkiewicz*, 534 U.S. at 515). Accordingly, "[a]bsent any indication from the Supreme Court that qualified immunity might warrant an exception to this general approach and the explicit disclaimer of a heightened pleading standard in [*Twombly*], reinforced by the reversal of the Tenth Circuit's use of a heightened pleading standard in *Erickson*, we conclude that a heightened pleading rule may not be imposed." *Id.*

In sum, in the context of section 1983 and elsewhere, *Twombly* stands in accord with *Crawford-El*, *Swierkiewicz*, and *Leatherman*, rejecting a heightened pleading standard and, instead, embracing the original articulation of notice pleading contemplated by the Federal Rules of Civil Procedure. The *Conley* gloss swung to an extreme which has now been eradicated, leaving in place the settled precedent that applies in all contexts save those enumerated in Fed. R. Civ. P. 9(b). Inasmuch as the lower courts are arriving at the same conclusion in the qualified immunity context, aided by this Court's guidance in *Erickson*, certiorari is not warranted.

B. This Case Is a Poor Vehicle for Certiorari Review Because Back Adequately Pled Her Political Affiliation Dismissal Claim Under Either a Notice Pleading or a Heightened Pleading Standard.

This case is a poor vehicle for certiorari review because the allegations in Back's complaint present sufficient detail to satisfy either a notice pleading or a heightened pleading standard.

In the context of qualified immunity, the initial inquiry is whether, taken in the light most favorable to the party asserting the injury, "the facts alleged show the [government official's] conduct violated a constitutional right." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If so, the next inquiry is whether the constitutional right at issue was clearly established. *Id.* This "*Saucier* two-step" or "order of battle" test has been steadily applied across the circuits. *See, e.g., Scott v. Harris*, 127 S. Ct. 1769, 1774 (2007); *Hubbard v. Taylor*, 538 F.3d 229, 238 (3d Cir. 2008); *Jennings v. Jones*, 499 F.3d 2, 10 (1st Cir. 2007); *Caudill v. Hollan*, 431 F.3d 900, 910, 913 (6th Cir. 2005).[6]

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[6] This Court requested briefing on and is currently considering the question whether *Saucier* should be overruled in the Fourth Amendment setting. *See Pearson v. Callahan*, 128 S. Ct. 1702 (2008). Even the petitioners in that case argue that "the Court should only resolve the 'order of battle' for Fourth Amendment claims." Pet.'s Brief, *Pearson v. Callahan*, No. 07-751, 2008 WL 2367229, at *56 (June 6, 2008). The settled

With respect to whether the facts alleged in Back's complaint show the violation of a constitutional right, the answer is unequivocally yes. Since 1976, patronage dismissals have been recognized as unconstitutional under the First and Fourteenth Amendments because they "severely restrict political belief and association." *Elrod v. Burns*, 427 U.S. 347, 372 (1976); *see also Caudill*, 431 F.3d at 908. To state a claim, a plaintiff must allege that she was discharged due to her political affiliation. *Branti v. Finkel*, 445 U.S. 507, 517 (1980). This Court articulated an exception for those policymaking or advisory positions where the government official can show that "party affiliation is an appropriate requirement for the effective performance of the office involved." *Id.* at 518; *see also Goodman v. Pennsylvania Tpk. Comm'n*, 293 F.3d 655, 663 (3d Cir. 2002).

Reading the allegations contained in Back's complaint as a whole, *e.g., Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 112 (1979); *Black v. Lane*, 22 F.3d 1395, 1400 (7th Cir. 1994); *Garita Hotel Ltd. P'ship Etc. v. Ponce Fed. Bank*, 958 F.2d 15, 17-18 (1st Cir. 1992), she states a claim of patronage dismissal under any standard. She has carefully sketched a background of detailed facts supporting her claim (in even more detail than summarized here), describing her hiring on February 16, 2003 as a classified (or merit system) employee protected under the Kentucky civil service statute (Pet. App. 18;

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standard to be applied to this case is thus not under review and remains undisturbed.

Compl. ¶¶ 10-11); the transitional time following the November 2003 gubernatorial election while Back was the only merit system employee who remained as the administration changed from Democratic to Republican (*Id.* ¶¶ 12-14); the replacement in March 2004 of Col. Nelson with her supervisor, Erwin Roberts, and the responsibilities she took on of processing federal grant applications and funding (Pet. App. 18-19; Compl. ¶¶ 13, 16), of setting up the competitive grant application process, and of serving as staff to the review committee which evaluated grant applications (Pet. App. 20; Compl. ¶¶ 22-23); that she never held any policy-making position or job duties within OHS (Pet. App. 19; Compl. ¶ 15); the rejection by officials in the Office of the Governor of a number of grants recommended by the review committee on partisan grounds and based on political affiliation of the applicants (Pet. App. 21; Compl. ¶ 24); Back's voicing of her concern about the use of political affiliation in the awarding of federal Homeland Security Grants (Pet. App. 22; Compl. ¶ 26); Back's helping develop questionnaires and rating sheets to evaluate potential employees based on their knowledge and experience in federal grant administration, and that when Back voiced her concern about the fact that prospective employees were asked about their political affiliation, she was largely excluded from the interviewing process (*id.* ¶¶ 27-28); the concern expressed by Roberts regarding the branch manager civil service position he was going to offer to Back and his comment, later, of "Trust me, you don't want it" because it required direct involvement with Schrader, who repeatedly invoked political consid-

erations in awarding grants and hiring personnel (Pet. App. 22-23; Compl. ¶29-30); the appointment on September 1, 2004 of Back to the position of Internal Policy Analyst III, also a classified position (Pet. App. 23; Compl. ¶ 31); Roberts' resignation in October 2004 and Hall's appointment as Executive Director of OHS in November 2004 (*id.* ¶¶ 32-33); and Back's termination on January 19, 2005 (Pet. App. 24, Compl. ¶ 36), because of her political affiliation as a Democrat in violation of the First and Fourteenth Amendments of the Constitution (Pet. App. 25; Compl. ¶¶ 37, 39).

These facts are set out in greater detail than is usual in a case where, as here, discovery has yet to take place. There is easily enough to clear the notice pleading standard of Rule 8 of the Federal Rules of Civil Procedure and the *Twombly* plausibility standard, 127 S. Ct. at 1974 (a complaint must be sufficient "to state a claim to relief that is plausible on its face"). There is no need to refer to the now-defunct *Conley* "no set of facts" gloss -- Back has clearly set out the facts, assumed as true and with all inferences drawn in her favor, illustrating, *inter alia*, the anti-Democratic animus of the new Republican administration, recounting even her prior supervisor's concern that she not take certain civil service positions due to that animus, and the tight temporal period between the hiring of Hall and her termination. The set of facts alleged by Back more than adequately supports her patronage dismissal claim. *Twombly*, 127 S. Ct. at 1965, 1974; *Erickson*, 127 S. Ct. at 2200; *see also Swierkiewicz*, 534 U.S. at 510-11 (holding that Title VII complaint need not contain specific

facts sufficient to establish a prima facie case); *Robbins*, 519 F.3d at 1249 (concluding complaints in cases subject to qualified immunity defenses need not include "all the factual allegations necessary to sustain a conclusion that defendant violated clearly established law" but must make clear the "grounds" on which plaintiff is entitled to relief).

Certainly, as far as qualified immunity is concerned, Back satisfies the first inquiry: whether, taken in the light most favorable to the party asserting the injury, "the facts alleged show the [government official's] conduct violated a constitutional right." *Saucier*, 533 U.S. at 201. It is well settled that a patronage dismissal claim constitutes a violation of the First and Fourteenth Amendments of the Constitution. *Elrod v. Burns*, 427 U.S. at 372; *Caudill v. Hollan*, 431 F.3d 900, 908 (6th Cir. 2005).

The second qualified immunity inquiry under *Saucier* is whether the right is clearly established. 533 U.S. at 201. In the context of a patronage dismissal case, the inquiry usually focuses on the position at issue -- i.e., whether the position falls within the *Elrod-Branti* policymaker exception. *McCloud*, 97 F.3d at 1543. In general, this is a question of law for the court; however "the legal determination cannot be made without some preliminary factual inquiry." *Almonte v. City of Long Beach*, 478 F.3d 100, 110 (2d Cir. 2007). Accordingly, "qualified immunity may only be granted on a motion to dismiss if 'the available record adequately supports the defendants' claim that it was objectively reasonable for them to believe that' party affiliation was an appropriate re-

quirement for the effective performance of the plaintiff's official duties." *Id.* (quoting *McEvoy v. Spencer*, 124 F.3d 92, 105 (2d Cir. 1997)). Otherwise, "the issue may be resolved at the pleading stage only where the complaint, or the relevant state or municipal provisions, provide sufficient facts about the plaintiff's job responsibilities." *Almonte*, 478 F.3d at 110; *see also Pleva v. Norquist*, 195 F.3d 905, 912 (7th Cir. 1999) (holding that although "[t]he question of whether a position is exempted from the First Amendment patronage dismissal ban is a factual one that should ordinarily be left for a jury to determine . . . in some cases, the duties and responsibilities of a particular position are clearly outlined by law," at which point "the court may make the determination, as a matter of law.").

To begin with, although Hall's petition finds fault with the Sixth Circuit's decision and *Crawford-El* in many ways, nowhere does it challenge the Sixth's Circuit's clear and considered holding that "Back's former position falls within the category of offices for which political affiliation is irrelevant." 537 F.3d at 556-58. Hall thus waived any argument that Back's position falls within the *Elrod-Branti* exception to the First Amendment protection against patronage dismissals.

Even leaving aside the issue of waiver, Back's complaint, well pled under a notice pleading or heightened pleading standard, alleged that she was a civil service employee and provided a detailed description of her various duties. (Pet. App. 18, 23; Compl. ¶¶ 10, 31). The Kentucky legislature classi-

fied her positions under the Kentucky civil service statute, and Kentucky law states that "[n]o person shall be appointed or promoted to, or demoted or dismissed from' such classified positions based on 'political . . . affiliations." Ky. Rev. Stat. Ann. §§ 18A.115, 18A.140(1); *see also id.* § 18A.111(1) (allowing probationary employees to appeal as provided in § 18A.095 (which allows administrative appeals based on discrimination)). Hall's petition provides no reason to abandon settled Sixth Circuit law that gives presumptive deference to a state legislature's determination that a position "should be classified as . . . nonpolitical." *Rice v. Ohio Dep't of Transp.*, 14 F.3d 1133, 1143 (6th Cir. 1994). Moreover, as the Sixth Circuit pointed out, at the time of Back's termination, "Sixth Circuit precedent established at the least that an administrative employee like Back, who 'simply perform[s] functions over which he or she has no discretion, or no discretion of political significance,' is entitled to First Amendment protection." *Back*, 537 F.3d at 557 (quoting *Caudill v. Hollan*, 431 F.3d 900, 909-10 (6th Cir. 2005); *McCloud v. Testa*, 97 F.3d 1536, 1559 (6th Cir. 1996)). Accordingly, the constitutional right at issue was clearly established with respect to Back's former position, and Hall's qualified immunity defense falls of its own weight.

Inasmuch as Back's complaint presents enough detail for this Court to decide at this early stage that Hall's qualified immunity defense fails as a matter of law, *see Almonte*, 478 F.3d at 110, it is patently evident that the allegations in Back's complaint contain sufficient detail to satisfy either a notice pleading or

a heightened pleading standard, rendering this case a poor vehicle for certiorari review.

Finally, the decision below does not conflict with prior precedents of this Court. Nor does it present a matter of pressing public importance requiring this Court's intervention. In sum, certiorari is not warranted.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition.

Respectfully submitted,

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Dated: December 3, 2008